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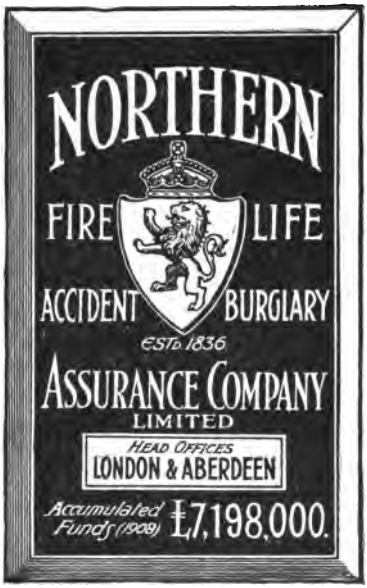

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AFFECTING

MARINE INSURANCE

BY

LAWRENCE DUCKWORTH

(OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW)

AUTHOR OF AN "EPITOME OF THE LAW AFFECTING CHARTER-PARTIES AND BILLS OF LADING," ETC., ETC.

SECOND EDITION REVISED AND ENLARGED

LONDON

EFFINGHAM WILSON

54 THREADNEEDLE STREET

1907

PREFACE TO SECOND EDITION.

This volume has been revised and brought up to date. The Marine Insurance Act, 1906, will be found set out *verbatim* in Appendix II. Mention has also been made of the Finance Act, 1901, and the Revenue Act, 1903 in reference to policies of marine insurance. The latest and more important decisions which have come before the House of Lords since the last publication of the book are given in the last chapter—a new one.

The question in the case of the *Steamship Balmoral Co.* v. *Marten* [1902], *A.C.*, 511 dealt with on p. 113 is important in its bearing on a rule of practice which has prevailed among underwriters and average staters for a considerable period. That case settles the point that underwriters are liable only for that proportion of salvage and general average losses which the policy value bears to the proved value.

I hope the index may satisfy the most exacting.

LAWRENCE DUCKWORTH.

MIDDLE TEMPLE, LONDON,
September, 1907.

GLOSSARY OF THE PRINCIPAL TERMS USED BY UNDERWRITERS IN REFERENCE TO MARINE INSURANCE.

A.P.	Additional Premium.
C.C.	Continuation Clause.
C.F.I.	Cost, Freight and Insurance.
C.T.L.	Constructive Total Loss.
D.C.	Detention Clause.
G.A.	General Average.
F.C.S.	Free of Capture and Seizure.
F.A.A.	Free of All Average.
F.G.A.	Foreign General Average.
F.P.A.	Free of Particular Average.
H.C.	Held Covered.
R.D.C.	Running Down Clause.
P.P.I.	Policy Proof of Interest.
P.A.	Particular Average.
T.L.O.	Total Loss Only.
N.R.	No Risk.
R.I.	Re-Insurance.
S.L.	Salvage Loss.
Y.A.R.	York Antwerp Rules.
F.P.	Floating Policy.
O.P.	Open Policy.
Thirds	No Thirds.

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AN EPITOME OF THE LAW AFFECTING MARINE INSURANCE.

CHAPTER I.

Marine Insurance the most ancient form of Insurance—Time uncertain as to when it was first practised—At present day large number of Marine Insurances effected by Underwriters—The Losses which a Shipowner or Merchant is not protected against in United Kingdom—Terms used in relation to the Contract — Distinction between a "Policy" and a "Wager"—"An Interest in an Event"—The Contract of Marine Insurance a Contract of Indemnity.

THE most ancient of the various forms of insurance is that of marine insurance. It is not exactly known at what time or place marine insurance was first practised. It probably began to be practised in Italy somewhere about the thirteenth century, the Lombards being the first persons to introduce it into England. In the year 1601, the business of marine insurance had become very extensive in this country. At the present day, a large number of marine insurances are effected at the risk of individuals called underwriters.

Prior to the year 1824, all firms and companies (except the Royal Exchange and London), were forbidden to take marine insurances, but at the period mentioned all restrictions were removed, and the

business of marine insurance was placed upon the same footing as other businesses.

The principal marine insurance companies in London are the following: The two old chartered companies, the Royal Exchange and London Assurance Corporations; the Indemnity Mutual Marine, the Alliance Marine and the Ocean Marine, established upon the passing of the Act of 1824; The Marine Insurance Company, established in 1836; and the Neptune, Thames and Mersey Marine Insurance Company, established in 1860.

The losses which a shipowner or merchant is *not* protected against by an insurance in the United Kingdom are these, namely—(1) losses arising from the unseaworthiness of the particular vessel, (2) average clause, (3) breaches of the law of nations, (4) consequences of deviation, (5) Acts of the British Government, (6) breaches of the revenue laws, (7) all loss to which the shipowner is liable in consequence of damage done by his own vessel to other vessels, and (8), losses arising from unusual protraction of the voyage.

In a contract of insurance the agreed consideration is called the *premium;* the written contract, the *policy;* the events insured against, *risks* or *perils*, and the subject, right, or interest to be protected, the *insurable interest.*

The distinction between a policy and a wager is this: a policy is, properly speaking, a *contract to indemnify* the insured in respect of some interest which he has against the perils which he contemplates it will be liable to.

"*An interest in an event*" is, that if the event happens the party will gain an advantage; if it is frustrated, he will suffer a loss.

A plaintiff was interested in a company which was about to lay down a cable across the Atlantic. If that event happened, there can be no doubt the owner of shares in the company would be better off; if it did not happen, there can be no doubt his position would be worse. It follows, then, equally without doubt, that if by proper words the parties have entered into a contract of insurance for that interest, the policy is good (see p. 17).

The subject-matter of the insurance must be properly described; the nature of the interest may in general be left at large.

The contract of marine insurance is a contract of indemnity. The Marine Insurance Act, 1906, defines such a contract as "a contract whereby the insurer undertakes to indemnify the assured in manner, and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure". There must be in every such contract an insurable interest of appreciable value. There must also exist between the parties to the commercial contract the utmost good faith. The maxim of the English law in cases where there has been a purchase and sale, there being on either side neither fraud or misrepresentation, is *caveat emptor* (let the buyer beware). In contracts of guarantee there must be no concealment provided inquiry is made. But a contract of marine insurance, is a contract *uberrimæ fidei*. To begin with, the ship must be seaworthy,

"In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall *continue* seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against" . . . "nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, and the doing an act which ought not, in the course of the navigation. It matters not whether a fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference whether any

other part of the equipment were lost by mere neglect, or thrown away or destroyed, in the exercise of an improper discretion, by those on board. If there be any fault in the crew, whether of omission or commission, the assured is not to be responsible for its consequences."[1]

Again, "if the vessel, crew, and equipments be originally sufficient, the assured has done all he contracted to do and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance".[2]

The expenses of a survey are necessary to ascertain the seaworthiness of a vessel, and her fitness to go to sea with regard to the safety of the crew and of the vessel, and will always be allowed as proper expenses incurred for the benefit of the whole adventure.

The contract of insurance is required by law to be contained in a written policy.

[1] Per Parke, B., in *Dixon* v. *Sadler*, 5 *M. & W.*, 414, 415.
[2] *Ibid.*, 414, 415.

CHAPTER II.

The Established Rule of Law in reference to a written Contract — Case of *Ionides* v. *Universal Insurance Co.* — The Object of a Marine Insurance Policy—Value in Policy the conclusive Standard of Indemnity—How Policies are made in England.

IT is an established rule of law that a written contract (subject to certain known exceptions), shall be taken to contain and express the entire contract between the parties, and there cannot be any doubt that subject to these exceptions, a written instrument, whether it be appointed by law or by a compact of the parties to be the memorial of the contract, shall not be altered, added to, or varied (see also p. 27). By the law of England, in a time policy effected on a vessel then at sea, there is no implied condition that the ship shall be seaworthy on the day when the policy is intended to attach. Lord Campbell in one case [1] held that there was not in a time policy effected on a vessel then abroad, *any implied condition whatever as to seaworthiness*, not even as to the time when the vessel sailed on the voyage during which the policy attached. In that case a policy of insurance was effected in London, on 27th November, 1843, on a ship then abroad, in these terms:

[1] *Gibson* v. *Small* 4 *H.L., Cas.*, 353.

"lost or not lost, in port and at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months commencing on 25th September, 1843, and ending on 24th September, 1844, both days included". To a claim for a total loss on the 14th October, 1843, by perils of the sea, the defendant pleaded that "ship was not at the time of the commencement of the risk in the policy of insurance mentioned, nor at the making of the said insurance, nor on 25th September, 1843, in the" [claim] "mentioned, seaworthy, or in a fit and proper condition to go to sea; but, on the contrary, was wholly unseaworthy". From the evidence, it appeared that on the 24th September, 1843, the ship was at sea, seriously damaged, and in that state she succeeded in making Madras in the course of the following day. The jury found the claim to be proved in fact. However, the judges in the House of Lords (where the case was eventually taken) found that the defendant's plea did not afford a defence to the action, for there was no implied condition that the ship should be seaworthy on the day when the policy was intended to attach.[1]

In a case which came before the old Court of Exchequer Chamber in 1863[2] the facts were shortly these: Goods consisting of 6,500 bags of coffee valued at £25,000, on board the ship *Linwood* were insured on a voyage from Rio de Janeiro to New Orleans, and thence to New York, the policy containing an excep-

[1] See also *Thompson* v. *Hopper*, *E. B. & E.*, 1038, and *Fawcus* v *Sarsfield*, 6 *E. & B.*, 192.

[2] *Ionides* v. *The Universal Marine Insurance Co.*, 14 *C.B., N.S.*, 259.

tion in the following words — "warranted free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, *and free from all consequences of hostilities*, riots, or commotions". The insured ship with the coffee on board on her voyage from Belize to New York had to pass Cape Hatteras. The captain, intending to shape his course North-east until he had rounded the Cape, and then to steer due North, being out of his reckoning, and conceiving that he had passed the Cape, when he was in fact about thirty miles south and ten miles west of it, ran the ship on shore at Hatteras Inlet, where she was eventually lost. If these had been the only facts, it would have been a clear case of loss by perils of the sea. But it appeared that, at Cape Hatteras, until the secession of the Southern States of America, there had always been a light maintained; and that the light had been extinguished, for hostile purposes, by the Confederate or Southern party, who were at that time in possession of North Carolina. It was taken as a fact for the purpose of the judgment in the case, that, if the light had still been there, the captain would have seen it and might have put about in time and saved the ship. The great contention on the first part of the case was, whether the loss so brought about was a loss by the "*consequences of hostilities*" within the meaning of the policy. That question the Court held was entirely one of construction, that is to say the intention of the parties was to be gathered from the contract itself, taking it with the surrounding circumstances. Such a construction was to be put upon the language of the instrument as

in the opinion of the Court must have been intended by the parties to it. The words of the exception in such a policy were to be construed as they would be if the assured had re-assured his cargo against the perils which were excepted by the warranty in question; so that to make the policy attach, the Court must in such a case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim *causa proxima non remota spectatur* is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now, the relation of cause and effect is matter which cannot always be actually ascertained; but if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established. As to what may be conceived to be a "*consequence of hostilities*" within the meaning of such a policy the following instances may be given. Assuming that there was a hostile attempt to seize the ship, and that the master in seeking to escape capture ran ashore and the ship was lost; there the loss would be a loss by the consequences of hostilities within the terms of the above exception. Or, suppose the ship to be chased by a cruiser, and that to avoid seizure, she gets into a bay where there is neither harbour nor anchorage, and in consequence of her inability to get out she is driven on shore by the wind and lost; this, again, would be a loss resulting from an attempt at capture, and would be within the exception. But, where the ship is chased into a bay where she is unable to anchor or to make any harbour, and gets out

again on a change of wind, but in pursuing her voyage encounters a storm which but for the delay she would have escaped, and is overwhelmed and lost; there, although it may be said that the loss never would have occurred but for the hostile attempt at seizure, and that the consequence of the attempt at seizure was the cause without which the loss would not have happened, yet the *proximate* cause of loss would be the perils of the sea, and not the attempt at seizure. Assume that the vessel is about to enter a port having two channels, in one of which torpedoes are sunk in order to protect the port from hostile aggression, and that the master of the vessel, in ignorance of the fact, enters this channel, and his ship is blown up; in this case the *proximate* cause of the loss would clearly be the consequences of hostilities, and so within the exception. But suppose the master, being aware of the danger presented in the one channel, and in order to avoid it, attempts to make the port by the other, and by *unskilful* navigation runs aground and sustains a loss, this would not be a loss within the exception, not being a loss *proximately* connected with the consequences of hostilities but a loss by a peril of the sea, and covered by the policy.

When a ship is wrecked, and there is no appearance of the possibility of saving any part of the cargo, there is presumably a total loss of the cargo; but, when it is found that a part of the cargo might be saved, the presumption of a total loss ceases. And as it was proved in the case just referred to that 1,000 bags of the coffee might have been saved but for the circumstances before adverted to, those 1,000 bags must be taken to

have been potentially saved. The saving of them having been prevented by an act of hostility, those 1,000 bags were brought within the exception in the policy, and the underwriters were held not to be liable in respect of them.

The object of a policy of marine insurance is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel: whether upon such an event the loss is total or partial, no doubt depends upon circumstances. But the existence of the goods, or any part of them *in specie*, is neither a conclusive, nor in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed or can have the control of them, if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage in

such a state, though the *species* be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel; if it be certain that before the termination of the original voyage the *species* itself would disappear and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if, by any circumstances over which he has no control, they can never, or within no assignable period be brought to their original destination; in any of these cases, the circumstances of their existing *in specie* at *that forced termination* of the risk is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle.

"The assured certainly has always an option to claim or not; but his abstaining from his right does not alter the nature of it."

The value in the marine policy is the conclusive standard of indemnity, provided the valuation be not fraudulent, and no doubt can be cast upon that. It has been found for mercantile convenience that the subject matter of insurance should be valued, to preclude enquiry; and it would be so in almost any case. If the contract of the parties be departed from, the question would be one of degree, and if the policy is to be opened on the ground of over-value, it must be remembered that the value may be diminished in a thousand ways, as by natural decay, or by depreciation of market, etc. Over-value may, no doubt, be evidence

of intent to make a wagering policy, or of fraud on the part of the assured.

In England, policies are usually made in the name of the insurance broker, and many years have elapsed since it was decided that the broker need not be described as agent to enable the principal to sue upon them.

CHAPTER III.

Policy of Insurance—Assured's Interest need not be set out on face of Policy—Insurable Interest which Consignee may include in Policy—Where word "Ship," "Freight" or "Goods" is written in Margin of Policy—Risk on a Vessel under a Policy—Lord Bacon on the Impossibility of the Law to consider the Causes of Causes—Case of *Paterson* v. *Harris* (the cable case).

IT is quite clear that there is no obligation to disclose any matter which first comes to the knowledge of the assured *after* the policy is made, and it cannot be doubted that if there was a complete contract to execute a policy enforceable in a Court of Equity (which the slip in America appears to be; see *Duer*, p. 107), the Court of Equity would compel the party to execute the policy as of the date when he was bound to have executed it, notwithstanding any intervening facts, on the principle that in equity the thing is considered as done which ought to have been done. "The non-disclosure of a fact after the policy was made in equity, could have no more effect than a similar non-disclosure after it was made in law." If underwriters have (as by initialling a slip) made a contract of assurance, which although invalid at law and in equity by reason of the absence of statutory requisites, is, nevertheless, in practice, and according

to the use of those engaged in marine insurance, a complete and final contract binding upon them in honour and good faith whatever events may subsequently happen, there is no necessity for the assured to communicate to the underwriters facts which subsequently come to his knowledge *material* to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed.[1] But the assured must use due diligence to make his agents who are negotiating a policy, aware of all material facts which freshly come to his knowledge pending the negotiation.

"The principle to be derived from the authorities is, that the time between the slip and the policy is not to be counted, and the latter relates back to the former." The rule laid down in the cases of *Cory* v. *Patton* and *Ionides* v. *Pacific Insurance Co.* (*ante*) is this: The obligation that the law attaches to the relation of insurer and insured, namely, that up to the time of the insurance material facts must be communicated, must be taken with this qualification, that when there is a previous agreement out of which the policy of insurance substantially arises, by mercantile usage the obligation attaches up to the time of making such agreement only, and not up to the time of making the policy.[2]

The interest which the insured has in the subject of insurance, need *not* be set out on the face of the policy. The American law is the same as the English law in this respect. "The want of implied warranty

[1] See *Cory* v. *Patton*, *L.R.*, 7 *Q.B.*, 304.

[2] See *Lishman* v. *Northern Maritime Insurance Co.*, *L.R.*, 10 *C.P.* 719.

does not protect the insured against the consequences of his own fraud, or wilful concealment, in nullifying the insurance, nor does it deprive the insurer against such malversation, or of the security he may derive from the inspection which he has the opportunity of making for himself . . . as possibly justifying the implication of a warranty in a time policy, *i.e.*, when it is effected on a vessel about to sail on a particular voyage."

The law with respect to the insurable interest which a consignee may include in a policy and recover in his own name is stated, and correctly stated, in the fourth edition of *Arnould on Insurance* at page 72 in the following terms: "A consignee of goods, who is entrusted as a commission agent to sell them, or who has accepted bills on them, or has a general balance against the consignor, has an insurable interest in the goods or derivable out of them, at all events to the extent of his claim. . . . But . . . he must take care to describe the especial risks he means to cover, otherwise his insurable interest will be limited by the ordinary policy to such goods as are on board at the time the perils intervened."

Where the word "*ship*" is written in the margin of the policy, or "*freight*" or "*goods*" in such case the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. And this is done in cases where the subject meant to be insured is still more remote from "ship and goods".[1]

[1] See *Robertson* v. *French*, 4 *East*, 130.

The risk on a vessel under a policy to a place generally without any provision as to her safety there, terminates on the vessel being safely anchored at her port of destination in the usual place and manner.[1]

Lord Bacon has said: "It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."

In the case of *Paterson* v. *Harris*,[2] which was an action on a policy of insurance of a novel and somewhat remarkable character, the policy was on the plaintiff's share in a Company called the Atlantic Telegraph Company, formed for the purpose of laying down an electric cable between this country and America, in order to maintain telegraphic communication between the continents of Europe and North America. The policy was in the ordinary form of marine insurance, with the addition of a special agreement contained in a memorandum annexed to the policy, that the insurance should "cover and include the successful working of the cable when laid down". From the judgment in the case under consideration, it was satisfactorily shown that the purpose and effect of the policy was plainly to protect the insured against the loss of, or injury to, the cable (on the successful laying down of which the interest of the Company and its shareholders depended), from sea risk during the time it was being carried out or

[1] See *Phillips on Insurance*, s. 969.

[2] 1 *B. & S.*, 336.

being laid down between the opposite shores. It appeared to have been taken for granted that, the cable once safely laid down, its successful working would follow as a necessary consequence. But such did not prove to be the case. Although an electric cable, extending from the Irish to the North American coast, was finally laid down, it was found impossible to maintain electric communication by means of it sufficient for telegraphic purposes, and the working of the telegraph was at all events for the time, abandoned. A great depreciation in the value of the shares of the company necessarily followed; and the principal question in the case was whether the plaintiff was entitled to recover on the policy in respect of that loss.

Now, the cause of the failure was, beyond doubt, the imperfect insulation of the wire, arising from some defect, in one or more places, in the outer covering by which the wire was protected from external contact; and according to the finding of the jury, which was well warranted by the evidence, and was not complained of, that defect was occasioned by accident prior to the shipment of the cable and the commencement of the risk "*aggravated by the action of the sea*". Understood by the light of the evidence of the plaintiff's witnesses (none were called by the defendants), and of the contention of the counsel at the trial, the finding of the jury was taken to have reference to the *chemical* action of the sea-water on the interior of the cable, to which, by the defect of the outer covering at the time the cable was immersed in the water it was enabled to penetrate

and not to any mischief done by the violence or *mechanical* action of the sea. It was decided, that this was not an injury which could properly be referred to as "perils of the seas," under which head of damage it was contended for the plaintiff that the loss fell. Further, an injury of this nature, not arising from the external violence or mechanical action of the winds or waves, but which was the natural and necessary consequence of the ordinary action of the sea-water on the cable in the state in which it was when immersed in the sea, was not comprehended in the perils insured against. The injury, so far as the damage occasioned by the sea was concerned, was the inevitable consequence of the immersion of the cable in its then state in the sea-water. But the purpose of insurance is to afford protection against contingencies and dangers which may or may not occur; it cannot properly apply to a case where the loss or injury must inevitably take place in the ordinary state of things. The wear and tear of a ship, the decay of her sheathing, the action of worms on her bottom, have been properly held not to be included in the insurance against perils of the seas, as being the unavoidable consequences of the service to which the vessel is exposed. The insurer cannot be understood as undertaking to indemnify against losses which, in the nature of things, must necessarily happen; and it was for these reasons that the Court was of opinion that the plaintiff was not entitled to recover in respect of this portion of his claim.

There was a further question which arose on a second head of claim in respect of a partial loss. In

the laying down of the cable, 375 miles of cable were lost under circumstances, which, it was admitted, would come under the head of perils of the seas. The question was, whether the plaintiff was entitled to recover in respect of that loss, and, if so, upon what principle the damages should be assessed.

On behalf of the defendant it was contended that, as the value of a share in the Company would have risen higher than the estimated value fixed by the policy if the cable actually laid down, could have been successfully worked, the partial loss of a portion of cable could not be considered as included in an insurance on the share. But the loss of a quantity of cable belonging to the Company must necessarily be, *pro tanto* a loss on the capital of the company, and must so far tend to diminish the value of each share. It was further contended that the defendant was protected against this part of the plaintiff's claim by the memorandum of warranty against partial loss; inasmuch as the loss here could not amount to £3 per cent. on the total value of this share. It was at first doubted whether the warranty against partial average would apply to this case, but on considering that the insurance, though nominally on the share, was practically an insurance on the cable, as being the tangible substance in respect of which alone the share could be exposed to the risk of sea damage, it was decided that under these circumstances the warranty against partial average applied, and consequently that unless a loss of £3 per cent. had been sustained, the plaintiff could not recover.

"In order to ascertain the amount of the loss, a

distinction may properly be taken. That portion of the cable which was lost in the first attempt to lay down the cable, and which it became necessary to replace by new cable, should be estimated at the cost of the substituted cable, for, as far as that is concerned, the parties interested have suffered the loss of the whole price which they paid to replace it. As regards that portion of the lost cable which was taken out as superfluous cable, by way of a provision against accident, it may be reasonable to consider how far such cable, if not lost, would have been depreciated in marketable value by having been coiled in the hold of a vessel or by other circumstances. These are subjects which a referee conversant with matters of insurance (the parties having agreed that if the plaintiff shall be held entitled to a verdict in respect of partial loss, the damage should be assessed out of court), will probably have no difficulty in dealing with. If the arbitrator, estimating the percentage on this principle, should find that it amounts to less than £3 per cent., then, as on the construction we have put upon this policy, it is an assurance on the cable, that is on goods, and the warranty, as we have already stated, in our opinion applies, and the defendant will be entitled to the verdict. If the loss amounts to more than £3 per cent., then the verdict must be entered for the plaintiff for the amount of the loss."

The following rule was then drawn up:—

"Upon reading, etc., and upon hearing, etc., it is ordered that the arbitrator appointed by the parties do assess the damages as to the 373 miles of cable upon the principle laid down by the court, and if he

find that the damage so assessed amounts to or exceeds £3 per cent., the verdict is to be entered for the plaintiff as to such portion of the amount so found as the defendant's subscription bears to the whole sum insured by the policy, and costs 40s.; but if such damages amount to less than £3 per cent., then the verdict is to be entered for the defendant."

CHAPTER IV.

No change of Property in Case of Capture before condemnation according to English law—Judgment of Lord Mansfield in *Hamilton* v. *Mendes*—Cases of *Dudgeon* v. *Pembroke*, *Oppenheim* v. *Fry*.

By the maritime law, received and practised in England, there is no change of property in case of a capture before condemnation, and since the passing of the statute 29 George II. c. 34 s. 24, the *jus postliminii*[1] continues for ever.

But, as Lord Mansfield said, in *Hamilton* v. *Mendes*:[2] "It does not *necessarily* follow, that, because there is a recapture, therefore the loss ceases to be total. If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; if further expense is necessary; if the insurer will not engage, in all events, to bear that expense, though it should exceed the value or fail of success; under these and many other like circumstances, the insured may disentangle himself and abandon, *notwithstanding* there has been a recapture."

In the case of *Dudgeon* v. *Pembroke*,[3] decided in 1877

[1] *I.e.* the right in virtue of which persons and things taken by an enemy are restored to their former state on recapture.

[2] 2 *Burr.*, 1,209. (Referred to in *Ruys.* v. *Royal Exchange Assurance Corporation* [1897], 2 *Q.B.*, 135.)

[3] *L.R.*, 2 *App. Cas.*, 284.

in the House of Lords, the action was brought by the appellant upon a policy of insurance by which the s.s. *Frances* was insured for a year for the sum of £5,800, the ship being valued at £8,000, and the machinery at £4,000. These words were written in on a printed form, which also contained in print the words "*at and from*," and "*for this present voyage*," and other similar words which are commonly found in the form of a voyage policy, and which had not been erased or struck through. It was held that the policy was a time and not a voyage policy, and not only so, but an ordinary time policy. The first question raised for the consideration of the House of Lords was, whether the law implies in such a contract any warranty that the vessel should be seaworthy at any period of the risk, and if so, at what period or periods?

Lord Penzance, in his judgment, said that it was no new question, having been raised in the cases of *Gibson* v. *Small*[1] (see *ante*), *Thompson* v. *Hopper*[2] (see *ante*), and *Fawcus* v. *Sarsfield*[3] (see *ante*). These three cases must be considered to have set at rest the controversies on this subject and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy, any warranty that the vessel at any particular time shall have been seaworthy.

In pronouncing the judgment of the Court in the latter case (*Fawcus* v. *Sarsfield*), Lord Campbell said "I think there is no implied warranty of seaworthiness in any time policy". "From that time to the present,

[1] 4 *H.L., Cas.* 353. [2] 6 *E. B. & E.*, 1038. [3] 6 *E. & B.*, 192.

these decisions have been acted upon and submitted to, and thousands of time policies have been effected, and millions in losses adjusted under them; and whatever may be argued as to the soundness of the conclusions then arrived at, or however desirable it may be, as a matter of public policy and concern, that some such obligation of keeping his vessel, so far as it is within his power, seaworthy, should be cast on a shipowner, the law must be considered as settled by these decisions, and any change made in it must be made by legislative authority alone." . . .

"A long course of decisions in the courts of this country has established that '*causa proxima et non remota spectatur*' (*i.e.*, the proximate and not the remote cause is regarded), is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it."

Instruments of bottomry are in use in all countries wherein maritime commerce is carried on. The lender of the money is entitled to receive a recompense far beyond the rate of legal interest; this recompense is very properly called in the civil law "*periculi pretium*," and of course no person can be entitled to it who does not take upon himself the peril of the voyage; but it is not necessary that his doing so shall be declared expressly, though this is often done; it is sufficient that the fact can be collected from the language of the instrument considered in all its parts. It has been said that such instruments being the language

of commercial men, and not of lawyers, should receive a liberal construction to give effect to the intention of the parties.

Hull and outfit are both protected by an insurance on ship. Under a policy of insurance the parties agreed to enter into an insurance upon the hull and machinery of a steamer, valuing the hull at £14,000, and the machinery at £8,000. The underwriters underwrote £17,650, and then came the stipulation "*average payable on the whole or on each as if separately insured*". There was also the ordinary memorandum that "the ship and freight are warranted free from average under £3 per cent., unless general, or the ship be stranded. The meaning of this contract was understood by one of the judges (Blackburn J.) to be this: the assurance was on one sum upon the whole, but the parties agreed that, for all purposes of average, it should be considered as if the £14,000 upon the hull was insured in one policy, and the £8,000 upon the machinery in another policy, and by another set of underwriters. Then came the question: What was the effect of that on the the ordinary memorandum? In construing the above policy, in which the parties had agreed that the hull and machinery should, for the purpose of average, be treated as if they had been separate subjects of insurance, they must be understood to have also agreed than any expenditure incurred entirely and exclusively for saving the whole subject of insurance should, for the purpose of adjusting the loss on this policy, be treated as general average, whether, strictly speaking, it was general or particular average.[1]

[1] See *Oppenheim* v. *Fry* 3 *B. & S.*, 873.

CHAPTER V.

Verbal Evidence Inadmissible in Policy of ordinary Form—Wages and Provisions of Crew during Repairs—Mere delay and Interruption in Voyage—Question whether Blockade constitutes a Restraint of Princes—Judgment of Cockburn in *Geipel* v. *Smith*—Cases of *Harrison* v. *Ellis*—*Joyce* v. *Kennard*.

IN an action on a policy of insurance in the ordinary form, the question whether verbal evidence of an usage is admissible to shew, that, for boats on the outside of a ship, slung upon the quarter, underwriters never paid, may be answered in the negative[1] (see *ante*, p. 6).

Wages and provisions of a crew during repairs, or during an embargo (*i.e.*, a detention of the ship) are not a loss within the policy because they are taken to form part of the expenses of the voyage.

It should be particularly noted, that a mere delay or interruption of the voyage will not give the assured a claim against the underwriters unless such delay is caused by a peril insured against, and the voyage or adventure is thereby altogether frustrated.[2]

In reference to the question whether a blockade is a restraint of princes, Lord Chief Justice Cockburn

[1] See *Blackett* v. *Royal Ex. Ass. Co.*, 2 *Cr. & J.*, 244, distinguished in *Stewart* v. *Mer. Mar. Ins. Co.*, 16, *Q.B.D.*, 619, *C.A.*

[2] See *Rodocanachi* v. *Elliot*, *L.R.*, 9 *C.P.* 518.

said in *Geipel* v. *Smith*:[1] "Is a blockade a restraint of princes? I think it is. It is an act of a Sovereign, State or Prince; and it is a restraint provided the blockade is effective; and in the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through. In such a case the obstacle arises from an act of state of one of the belligerent sovereigns, and consequently constitutes a restraint of princes." . . . "The restraint must cease within a reasonable time, and the duty of the defendants was to wait only a reasonable time to carry out their contract should the restraint be removed." . . 'It is sufficient answer on the defendants' part that, it was not likely to be removed within a reasonable time; and assuming that either party was bound to wait a reasonable time to ascertain whether the obstacle would be removed, in point of fact it was not so removed, and the defendants were therefore justified in not attempting to perform their contract." . . . "The contract is one entire contract, and that the impossibility of performing the whole within a reasonable time dispensed with the necessity of taking any steps towards its performance. And it is perfectly obvious that this is so; for what good would it have been to the shipper that the shipowner should go to the spout and take in the coals, if he could not proceed with the 'cargo' to Hamburg. None whatever. It is an entire contract, and anything that applies to make

[1] *L.R.*, 7 *Q.B.*, 404, at p. 410.

the performance of one part impossible must be taken to apply to the whole, and it is admitted that the defendants could not have got to their port of destination. The true way of looking at this case, as it appears to me, is this: it was an entire contract, and there was an insuperable obstacle to the performance of it *in toto*; and the defendants were therefore justified in not performing that part of it which was possible, but which, without the possibility of performing the other part of it, was useless."[1]

In one case, a time policy was made on the *B. C.* "on £15,000 on cargo valued at £15,000 with liberty to increase the value on the homeward voyage". The body of the policy was in the ordinary printed form, expressing the risk on the goods to be from the loading of them aboard the ship including risk of craft, and to endure until discharged and safely landed. On the margin of the policy was this memorandum "with liberty to load, reload, exchange, sell or barter, all or either goods, or property on the coast of Africa, and African islands, and with any vessels, boats, factories, canoes; and to transfer interest from the vessel to any other vessel, or from any other vessels to this vessel, in port and at sea, and in any ports or places she may call at or proceed, without being deemed a deviation". The *B. C.* sailed to Africa with a cargo, part of which was landed in a factory for the purposes of barter, and was lying at anchor loading from the factory native produce, when the factory with its contents was destroyed by fire. It

[1] See also the case of the *Teutonia*, *L.R.*, 3 *A. & E.*, 394.

was decided that the policy embraced only maritime risks, and did not protect either the goods which had been part of the cargo of the *B. C.*, but had been landed in the factory, or the produce intended to be her cargo, but still on shore ; whether that produce had been obtained by barter of the *B. C.'s* cargo or otherwise.[1]

In a case which came before the courts in 1871, the plaintiffs J. & Son were lightermen, and effected an insurance in the form of an ordinary Lloyd's policy, at and from all wharves on the Thames, from Wandsworth to the Victoria Docks. Such policy contained the following clause: "Lost or not lost at and from all or any of the wharves, banks, quays, and places of arrival or departure in the River Thames, and any merchant or steam-vessel of any description therein comprising the whole extent of the said river from Wandsworth downwards to the Victoria Docks, including all or any intermediate docks and wharves, and *vice versâ*, until on board any merchant or steam vessel, barge, or boat, or otherwise, landed at any wharf, etc. The risk to commence on the 25th day of Sept., 1869, and to terminate on the 24th day of Sept., 1870, including both days, upon any kind of goods and merchandise . . . in craft of any description . . . the adventure beginning upon the said goods and merchandise from the loading thereof aboard the ship as above, . . . and so continue and endure during her abode there upon the said ship, etc., and, further, until the said ship with all her ordnance, tackle, apparel,

[1] See *Harrison* v. *Ellis*, 7 *E. & B.*, 465.

etc., and goods and merchandise whatsoever shall be arrived at as above upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandise until the same be there discharged and safely landed; and it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay at any ports and places whatsoever and wheresoever in the River Thames from Wandsworth to the Victoria Docks and *vice versâ*. The ship, etc., goods and merchandise, etc., for so much as concerns 'the assured by agreement between the assured and assurers in this policy are and shall be valued at on all goods and produce as interest may appear'." The sum stated in the margin was £2,000. The premium was 70s. per cent., and at the bottom of the policy, in writing, was the following clause: "To cover and include all losses, damages, and accidents amounting to £20, and upwards, in each craft to goods carried by Messrs. J.—— as lightermen, or delivered to them to be water borne, either in their own or other craft, and from which losses, damages, and accidents, Messrs. J.—— may be liable or responsible to the owners thereof, or others interested. It is agreed that the amount of each underwriter's liability shall not exceed the amount of his subscription." This policy was subscribed by different underwriters for different sums, amounting in the whole to £2,000. The defendant underwrote the policy for £100, and received, by way of premium, the sum of £3 10s. On the 7th December, 1869, and during the continuance of the risk covered by the policy, a loss, damage and accident

within the meaning of the policy, happened to goods carried by the plaintiffs, as lightermen in a craft called the *Lord Cardigan*, for which loss the plaintiffs had become liable and responsible to the owners and others interested in the goods to the sum of £1,100, and had paid that amount. The question was: What was the construction to be put upon the words of such a policy? The Court decided that it was not strictly speaking a marine insurance policy, but a contract whereby the defendant indemnified the plaintiffs against any liability which they might incur as carriers to the owners of the goods entrusted to them. The words were therefore construed according to their ordinary meaning, and upon the true construction of the policy the plaintiffs were held entitled to be indemnified for the loss actually sustained, namely £1,100, and to recover from the defendant £55 as his proportion of such loss.[1]

[1] See *Joyce* v. *Kennard*, 1871, *L.R.*, 7 *Q.B.*, 78.

CHAPTER VI.

Where Underwriter after having acquired Knowledge of the Fact of Concealment gives out Policy—Person acting by Orders of the Insured—Case of *Gladstone* v. *King*—Judgments of Cockburn, C. J., in *Proudfoot* v. *Montifiore*, and *Bates* v. *Hewitt*—Material Fact—Case of *Anderson* v. *Pacific Fire and Marine Insurance Co.*—Underwriter not responsible for any Loss occasioned by Fraud.

IF an underwriter, after having acquired a knowledge of the fact of concealment, gives out a policy without notice, and as if it were binding on him, he does that which would induce the assured to think that he had a valid policy, and to seek no further for insurance. He cannot be allowed to wait until a loss has occurred, and then elect to rescind, when his own act has put the assured in a condition in which he can no longer insure himself anywhere. If, however, the underwriter becomes aware of the concealment after the slip is issued and before the policy is signed, one may look at the time of initialling the slip as the time when the rights of the parties are fixed, and this independently of authority. Furthermore, one can do so in any conceivable state of the stamp laws, for the question does not relate to the document, but to a period of time not mentioned in the document. There is nothing repugnant to the contract in it. Without using any doubtful or contested terms, such as "condition," the obligation of the underwriter

is undoubtedly affected by what does not appear upon the policy. "If at the time of making the policy, *a matter which is material is concealed*, it defeats the policy. The assured is not bound to communicate a matter of which he became aware after the slip was initialled, on the ground that the initialling of the slip was the time at which the rights of the parties were fixed. The defendants, therefore, are at liberty to shew that before signing the slip they did not know a matter that ought to have been communicated to them, although before executing the policy they did.

"It is a general principle of law, founded both on justice and authority, that even in cases of fraud, when a man has notice of any matter which gives him a right either to insist upon a contract or to treat it as void, he must say within a reasonable time whether he determines to go on or to avoid it; and the observation is a forcible one that if the principle were not applicable in this case, a man would have greater power under an innocent than under a fraudulent concealment. Now it seems to me that where the transaction consists of several acts, when the time arrives for taking the next step in furtherance of the contract, then is the time, either as a matter of right in itself, or because it is the natural and reasonable time, for the party who is to take the next step to declare his election." The policy is the property of the assured from the time of its execution. When the time arrives for giving out the policy, the underwriter should either refuse to do so, or, if the plaintiff insists on his right to have the policy and try the question, it should be given with an intimation that the underwriter elects

to avoid. A man may, by words or by conduct, elect to waive an objection which entitles him to avoid a contract; and if he does so he cannot afterwards set up that objection. In dealing with the question of election, the judges ought to take into consideration the position of the person doing it, as regards knowledge of all the facts.[1]

In a policy of marine insurance, any person acting by the orders of the insured, and who is in any way instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter, *before* the policy is effected; and where any misrepresentation arises from his fraud or negligence, the policy is void. Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two gave him credit ought to bear the loss. "On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted, that the principal knows whatever the agent knows. And there is no hardship on the plaintiff: for if the fact had been known, the policy could not have been effected." "Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer".[2] (See also pp. 48 and 49.)

In the case of *Gladstone* v. *King*,[3] which was an action on a policy of assurance on a ship "*lost or not lost*," the master had omitted to communicate, when writing to his owners, the fact of the ship having been driven on

[1] See *Morrison* v. *Universal Insurance Co.*, *L.R.*, 8 *Ex.*, 40.
[2] See *Fitzherbert* v. *Mather*, 1 *T.R.*, 12.
[3] 1 *M. & S.*, 35.

a rock, a fact as to which, on arriving at the port of discharge, he made a protest, detailing the accident, and stating that the ship's bottom must have been chafed; and the owners, in ignorance of the accident, had effected an insurance. On these facts it was decided that the captain was bound to communicate the fact of the accident, and that for want of such communication, the antecedent damage was an implied exception from the insurance, and the plaintiffs could not recover the loss arising from the repairs rendered necessary by the accident. "If," . . . says Lord Ellenborough in that case, "the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent; by which means the underwriter at the time of subscribing the policy, would incur a certainty of being liable for an antecedent average loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew, and might have actually communicated to the plaintiffs the cause of damage, so as to have apprised them of it before the time of effecting the policy, I think that no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience; and there being no fraud imputed to the captain in the concealment will not alter the case."[1] . . . "If an agent whose duty it is,

[1] The actual decision in the case of *Gladstone* v. *King* has been criticised on the ground that logically the Court should have declared the policy void instead of merely holding that the effect of the con-

in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge that duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, that insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him information of *every material fact* of which the assured has, or in the ordinary course of business ought to have, knowledge, and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain through the ordinary channels of intelligence in use in the mercantile world all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it."

"It has been said, indeed, that a party desiring to insure is entitled, on paying a corresponding premium, to insure on the terms of receiving compensation in the event of the subject-matter of the insurance being lost at the time of the insurance, and that the misconduct of his agent ought not to deprive him of the advantage for securing that for which the premium

cealment was to exonerate the underwriters from the damage occasioned by the accident. But see judgments in the case of *Blackburn, Low & Co.* v. *Vigors* (1887), 12 *App. Cas.*, 531.

was paid. But to this there are two answers. First (as we have already pointed out), the implied condition on which the underwriter undertakes to insure—not only that every material fact which is, but also that every fact which ought to be, in the knowledge of the assured, shall be made known to him—is not fulfilled. Secondly, as was said by the Court in *Fitzherbert* v. *Mather*, where a loss must fall on one of two innocent parties, through the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed. By thus holding, we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance, in matters on which they ought to communicate information to their principals, as also any tendency on the part of principals to encourage their servants and agents so to act."[1]

Again, "No proposition of insurance law can be better established than this, namely, that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured. It is true, if matters are common to the knowledge of both parties, such matters need not be communicated. It is also true that when a fact is one of public notoriety, as of war, or where it is one which is matter of inference, and the materials for informing the judgment of the underwriter are common to both, the party proposing the insurance is not bound to communicate what he

[1] Per judgment of Cockburn, L.C.J., in *Proudfoot* v. *Montifiore*, *L.R.*, 2 *Q.B.*, 511.

is fully warranted in assuming the underwriter already knows. Short of these things, the party proposing the insurance is bound to make known to the insurer whatever is necessary and essential to enable him to determine what is the extent of the risk against which he undertakes to insure; and I apprehend that, as to the matters which the party proposing the insurance is bound to communicate to the insurer, there is no answer to be made, except that the insurer had, at the time of entering upon the contract, knowledge of the particular fact. I do not mean to say that, if the insurer choose to neglect the information which he receives, he can take advantage of his wilful blindness or negligence; if he shuts his eyes to the light, it is his own fault: provided sufficient information as far as the assured is concerned has been placed at his disposal. If, indeed, the insurer knows the fact, the omission on the part of the assured to communicate it will not avail as a defence in an action for a loss; not because the assured will have complied with the obligations which rested on him to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him, which he had present to his mind at the time he accepted the insurance; the law will not lend itself to a defence based upon fraud, it will not allow the underwriter to say 'I have taken the premium with the knowledge of the particular fact, but because the assured has not communicated it to me I will not make good the loss'. Therefore, if the fact be known to the underwriter, he cannot avail himself of the circumstance that it was not com-

municated by the assured; but putting that aside, it is the duty of the assured to make known to the insurer whatever is material with regard to the extent of the risk."[1]

In a word, the well-established rule with regard to concealment in a policy of insurance is this:—that the person who proposes an insurance should communicate *every fact* which he is not entitled to assume to be in the knowledge of the other party; and the assured is bound to communicate every fact to enable the insurer to ascertain the extent of the risk against which he undertakes to protect the assured. True, if it can be established that the insurer did know the fact, it will not lie in his mouth to say that the fact of which he had previous knowledge was not communicated; if it can be established that the *underwriter had knowledge of the fact*, the assured would be protected against the fraud of the underwriter in seeking, under such circumstances, to avoid the insurance. But, speaking generally, the omission by the assured to communicate a material fact is a good defence in an action against the underwriter on the policy, and it is *immaterial* whether the omission to communicate arises from intention, or indifference, or a mistake, or from its not being present to the mind of the assured that the fact was one which it was material to make known.

There is, however, one class of cases in which the assured can enforce the insurance although he has omitted to communicate a material fact of which in itself the insurer had no knowledge, and that is where

[1] Cockburn, C.J., in *Bates* v. *Hewitt*, *L.R.*, 2 *Q.B.*, 604.

the jury find by their verdict that from what he did communicate, coupled with any other fact that then might be present to the mind of the insurer, the latter, at the time he granted the insurance, might have inferred the existence of the fact which it was the duty of the assured to communicate.

There is no doubt that a material misrepresentation, though perfectly honest at the time, made with the intent that it should be acted upon by the assurer, and which has led to the policy being granted, will defeat the policy. The rule as to the good faith which is required to be observed on the affecting of a policy of insurance is so strict that the assured is bound to make known to the underwriter all the information in his power which is not within the ordinary knowledge and experience of an underwriter; and further, if a material fact which is stated to the underwriter turns out to be untrue, or a fact which is material to be stated is concealed from the underwriter, the policy is void, notwithstanding that the assured may have acted with perfect good faith and honesty of intention.[1]

"An underwriter is not responsible for any loss occasioned by the fraud of the assured. Moreover, whether there is, or whether there is not intentional concealment of a material fact is immaterial: in any case it vitiates the policy of insurance. For instance, excessive valuation of such a policy not only may lead to suspicion of foul play, but has a direct tendency to make the assured less careful in selecting the ship and captain,

[1] *Anderson* v. *Pacific Fire & Marine Insur. Co.*, *L.R.*, 7 *C.P.*, 65.

and to diminish the efforts which in case of disaster he ought to make to diminish the loss as far as possible, and cannot therefore properly be called altogether extraneous to the risks. However, it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this was required. But everything should be disclosed which would affect the judgment of a prudent underwriter governing himself by the principles and calculations on which underwriters habitually act; and underwriters do habitually act on the principle that it is material to take into consideration whether the over-valuation is so great as to make the risk speculative. This appears to be a reasonable practice."[1]

The question how far the contract of insurance is affected by misrepresentation or concealment on the part of the agent of the assured is discussed in the next chapter.

[1] See *Ionides* v. *Pender*, *L.R.*, 9 *Q.B.*, 538, 539.

CHAPTER VII.

Misrepresentation, etc., by Assured's Agent, and its Effect on Policy—Case of *Rivaz* v. *Gerussi*—The True Rule in Reference to Concealment—Condition precedent in every Contract of Marine Insurance to make full Disclosure—Cases of *Blackburn, Low & Co.*, v. *Vigors*—*Blackburn* v. *Haslam.*

IN order to avoid the policy of marine insurance, the misrepresentation or concealment by the master of a vessel must be *fraudulent.* The authorities establish that where the master of a ship, or the agent or correspondent of the owner, wilfully, or by culpable negligence, withholds any fact material to the risk, the owner, in making an insurance is identified with his agent and liable for his default.

In one case, an action was brought by certain underwriters for the purpose of having it declared that two several policies of marine insurance, which were open policies on shipments to be subsequently declared, were obtained by fraud and concealment of material facts, and to set them aside. The circumstances under which the action was brought were as follows: A series of policies were obtained at Lloyd's to cover fruit and other produce from Greece and the Ionian Islands, shipped to Liverpool or London in the autumn of 1875. There were four open policies; the first

two dated the 3rd September and the 1st October, the two subsequent polices, as to which the action was brought, were dated the 7th October and the 3rd November, but based upon slips signed upon the 1st October and the 5th October, 1875, respectively. On the 5th October, 1875, a steamer named the *Vindomora* appears to have sunk in the Thames, having a large and valuable cargo on board. A claim was made in respect of that loss, and it led to this action being brought. It appears to have been the practice of the defendants, in declaring upon the policies which they had effected, to make declarations for less amounts than the prices at which it was admitted they ought to have been made. The consequence was that at the time when the third or the fourth policy was effected, the earlier policies were, in fact, exhausted to a much larger extent than was disclosed. It appeared from the findings of the jury, on the questions submitted to them, that the declarations actually made were brought to the attention of the underwriters. The answer to the second question was, that the defendants made such declarations falsely and fraudulently, that such declarations were material to the subscription of the policies of the 7th October and the 3rd November, and that the plaintiff was induced thereby to subscribe them. The third finding was, that the defendants concealed and abstained from declaring the amounts insured by the policy, and the fourth finding, that it was material to the underwriters to be informed of the risks so concealed and abstained from being declared. There was, therefore, a non-disclosure of facts which were found by the jury to have been

material to guide the underwriters in arriving at the determination, whether in the first place they would accept the risk at all, and next, at what price they should accept it. The court held that it was impossible to say in face of these findings that there was not a non-disclosure of a material fact.[1]

The *true* rule in reference to concealment in insurance is, that where in reference to a negotiation for insurance one party suppresses, or neglects to communicate to the other, *a material fact* which, if communicated, would tend directly to prevent the other from entering into the contract or to induce him to demand terms more favourable to himself, and which is known, or presumed to be so, to the party not disclosing it, and is not known, or presumed to be so, to the other; in all such cases there is such a concealment as avoids the policy.

"It is established law that a person dealing with underwriters must disclose to them all the material facts which are known to himself and not to them, or, at all events, are facts which they are not bound to know. What are material facts has been defined by authority. It is the duty of the assured to communicate all facts within his knowledge which would affect the mind of the underwriter at the time the policy is made, either as to taking the contract of insurance, or as to the premium on which he would take it. The materiality of the fact depends upon whether or no a prudent underwriter would take the fact into consideration in estimating the premium or in underwriting the policy. The rule has been clearly laid down

[1] See *Rivaz* v. *Gerussi*, 6 *Q.B.D.*, 222.

over and over again, and is to be found in *Ionides* v. *Pender* (*ante*) and other cases."[1]

It is a condition precedent to every contract of marine insurance, that the insured shall make a full disclosure of all facts materially affecting the risk which are within his personal knowledge at the time when the contract is made. "Where an insurance is effected through the medium of an agent, the ordinary rule of law applies, and non-disclosure of material facts, known to the agent only, will affect his principal and give the insurer good ground for avoiding the contract."

In the case of insurance by a shipowner it has been held that he is affected by the knowledge of a class of agents other than those he employs to insure.[2] In the ordinary course of business the owner of a trading vessel employs a master and ship-agents, whose special function is to keep their employer duly informed of all casualties encountered by his ship, which would materially influence the judgment of an insurer. On that ground it has been ruled that the insurer must be held to have transacted business in reliance upon the well-known usage of the shipping trade, and that he is consequently entitled to assume that every circumstance material to the risk insured has been communicated to him, which ought in due course to have been made known to the shipowner before the insurance was effected. Accordingly, if a master or ship-agent, whether wilfully or unintentionally, fail in his duty to his employer, his suppression of a material fact will,

[1] Per Bowen, L. J., in *Tate* v. *Hyslop*, 15 *Q.B.D.*, 368 (*C.A.*) at p. 379.

[2] See Per Lord Watson in *Blackburn, Low & Co.* v. *Vigors*, 12 *App. Cas.*, 539, 540, 541.

notwithstanding his ignorance of the fact, vitiate his contract.

"I am of opinion . . . that the responsibility of an innocent insured for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship-agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed, not to procure or furnish information concerning the ship, but to effect an insurance. There is also . . . an important difference in the positions of those two classes with respect to the insurer. He is entitled to contract, and does contract, on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated, in due course, to his principal. So also, when an agent to insure is brought into contact with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not; but it cannot be reasonably suggested

that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing."[1]

"There is nothing unreasonable in imputing to a shipowner who effects an insurance on his vessel all the information with regard to his own property which the agent to whom the management of that property is committed possessed at the time, and might, in the ordinary course of things, have communicated to his employer. In such a case it may be said without impropriety that the knowledge of the agent is the knowledge of the principal. But the case is different when the agent whose knowledge it is sought to impute to the principal is not the agent to whom the principal looks for information, but an agent employed for the special purpose of effecting the insurance. It is quite true that the insurance would be vitiated by concealment on the part of such an agent just as it would be by concealment on the part of the principal. But that is not because the knowledge of the agent is to be imputed to the principal, but because the agent of the assured is bound, as the principal is bound, to communicate to the underwriters all material facts within his knowledge. Concealment of those facts is a breach of duty on his part to those with whom his principal has placed him in communication" . . . "it is not the function of a Court of Justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights. Whatever may be thought

[1] Per Lord Watson in *Blackburn, Low & Co.* v. *Vigors*, 12 *App. Cas.*, 539, 540, 541.

of" (a person's) "conduct from a moral point of view it would, in my opinion, be a dangerous extension of the doctrine of constructive notice to hold that persons who are themselves absolutely innocent of any concealment or misrepresentation, and who have not wilfully shut their eyes or closed their ears to any means of information are to be affected with the knowledge of matters which other persons may be morally though not legally bound to communicate to them."[1]

Although the opinion was expressed in the case of *Blackburn, Low & Co.* v. *Vigors* (above) that it was *not* the duty of the agents to communicate to their principals the information which they had received, that opinion applied to the particular facts before the House of Lords, which showed that before the negotiation for the policy sued upon had commenced, all connection of the plaintiff with his former brokers had ceased, and it cannot be supposed that it could be intended to apply to the facts of a case which showed that, so far from the connection between the principals and their agents ceasing, the brokers had used the name of the principals to continue the negotiations, and the principals had adopted the act, and had themselves continued and carried out what their brokers had commenced.[2]

[1] Lord Macnaughten in same case.

[2] See *Blackburn* v. *Haslam*, 21 *Q.B.D.*, 144.

CHAPTER VIII.

Deviation—Cargo—Delivery on board a purchaser's ship—Delivery by Consignor to Carrier—Cases of *Driefontein Consolidated Gold Mines, Ltd.*, and *Janson West Rand Central Gold Mines Co., Ltd.*, v. *De Rougemont.*

THE term "deviation" may be defined as "any unnecessary or unexcused departure from the usual course or general mode of proceeding toward the original termination of the insured voyage, so that the risk is altered, although it be not aggravated by such departure."[1] "It is not necessary to a deviation or change of risk whereby the underwriters are discharged that the degree or period of the risk should be thereby increased. The assured has no right to substitute a different risk."[2]

Where an underwriter insures a particular risk, the assured has no right to change it. Whether he increases or diminishes it is immaterial; if the assured varies it the underwriter is discharged.[3] However, where there is a real change of risk by the employment or detention of the ship for some purpose wholly foreign, the underwriter has a right to say, "I never

[1] See *Arnould on Marine Insurance*, 6th Edition, vol i., p. 450.

[2] See *Phillips on Insurance*, s. 983.

[3] See *Company of African Merchants* v. *British and Foreign Maritime Insurance Co.*, *L.R.*, 8 *Ex.*, 154.

undertook this risk". Lord Mansfield has said, "It is not material to constitute a deviation that the risk should be increased".[1]

When the words *usual* and *customary* are added to the word *direct*, more particularly when the breach is alleged to consist in "unnecessarily deviating from the usual and customary way," they must be held to qualify the meaning of the word *direct*, and substantially to signify that the vessel should proceed in the course usually and customarily observed in that her voyage. The law casts a duty on the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.[2]

Where a person purchases a cargo of rice which is to be loaded on board a ship expected to arrive at a particular port, where it is to load for a voyage, he agreeing to pay a sum certain "per cwt., cost and freight," such person has no insurable interest in the purchase, so that should the rice put on board be lost prior to the loading being completed, he cannot recover on a policy of insurance effected on goods in the ship.[3]

"Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to

[1] See *Hartley* v. *Buggin*, 3 *Dougl.*, 39.
[2] *Davis* v. *Garrett*, 6 *Bing.*, 716.
[3] See *Anderson* v. *Morice*, 1 *App. Cas.*, 713.

complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered." [1]

Delivery on board a purchaser's ship is a delivery to him, but where goods are shipped under a bill of lading making them deliverable to the shipper's own order, the property does not vest in the consignee until the bill of lading has been delivered to and accepted by him, and this rule applies to a delivery of goods in part performance of a contract as well as to a delivery of the whole quantity contracted for.

Undoubtedly it is true as a general rule that a delivery by a consignor to a carrier is a delivery to the consignee. "This is so if without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance, and it is still more strongly so if the goods are sent by a carrier, specially pointed out by the consignee, for such carrier then becomes his special agent."

In the cases of the *Driefontein Consolidated Gold Mines, Ltd.* v. *Janson* and *West Rand Central Gold Mines Company, Ltd.* v. *De Rougemont*,[2] the actions were brought by the two plaintiff companies against underwriters at Lloyd's to recover in respect of a loss of gold which had been seized by order of the Government of the South African Republic while in transit from the mines of Johannesburg in the Transvaal to the United Kingdom. The plaintiff company in the first case was registered under the law of the South African

[1] Per Parke, B., in *Oxendale* v. *Wetherell*, 9 *B. & C.*, 387.
[2] [1900] *L.R.*, 2, *Q.B.*, 339.

Republic, that in the second case under the English Companies Acts. The facts were these: The gold was despatched from Johannesburg on 2nd October, 1899, and during its carriage by train it was seized at the frontier of the Transvaal by the orders of the Transvaal Government. On 9th October an ultimatum was issued by the Transvaal Government to the British Government, announcing that if certain demands contained in the communication were not complied with, the conduct of the English Government would be treated as a declaration of war at five o'clock on the afternoon of 11th October. It was decided, that the intention of the Transvaal Government to wage war subsequently could not be treated as creating an actual state of war, and that the beginning of the war, which took place a few days later, could not make the seizure a hostile act; and further, that the subsequent breaking out of war did not invalidate the contract of insurance. Judgment was therefore given in both cases for the plaintiffs.[1]

Marine insurance (as we have pointed out *ante*) is a contract of indemnity, and it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages, which, but for the perils insured against, the assured would not suffer; and in every maritime adventure the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the

[1] Mr. Justice Mathew's judgment in the case was upheld by the Court of Appeal, and affirmed by the House of Lords (see [1902] *A.C.*, 484).

advantages to arise from the arrival of those things at their destined port. "If they do not arrive, his loss in such case, is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain without more risk than the capital itself would be liable to; and if when the capital is subject to the risks of maritime commerce it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks?"

CHAPTER IX.

Judgment of Cockburn, C. J., in *Hendricks* v. *Australian Insurance Co.*—Liability of Articles saved to contribute proportionately to General Average and Salvage—Case of *Aitchison* v. *Lohre*—Salvage—When Salvage is only chargeable—The Principle upon which the Liability of Underwriters is determined.

THE question in one case was, whether the defendants were bound to pay a particular average loss upon an insurance effected with them in these terms: "To cover only the risks excepted by the clause 'warranted free from particular average unless the vessel be stranded, sunk, or burnt?' To pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland; being warranted free from particular average unless amounting to 10 per cent on each series." It was decided that this policy was to be construed as if it had stood alone. Whether the words did or did not imply the existence of another policy effected on the same goods was quite immaterial, such other policy, if there had been one, not being so incorporated into the policy sued on as to affect this contract. If the words had stopped at '*stranded, sunk, or burnt*," the policy then would have covered only the risks excepted by the well-known clause in English policies; and the only claim the

assured would have had would have been particular average where there had been a stranding, sinking, or burning. However, the words which follow: "To pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland," would have no meaning unless they are incorporated with and govern the interpretation of the earlier words. The whole sentence must be read together. "The contract being that the particular average shall be stated in a certain way, namely, by an official dispacheur in Holland, the claims and losses to be paid under it are claims and losses which are to be considered as accruing and to be paid for according to Dutch law as applicable to the foregoing clause. The meaning is, that, if the vessel is stranded, sunk, or burnt and according to Dutch law a claim for particular average arises, that claim is to be made up by a foreign average stater, who would of course be governed in his consideration of the claim only by the law with which he was familiar, *viz.*, the Dutch law. That being the true and only construction of this passage in the policy, the case finds that a particular average statement was made up by an official dispacheur and properly made up according to Dutch law, and that a claim arose and a loss was sustained which, according to the Dutch law, the assured were bound to satisfy."[1]

The liability of the articles saved to contribute proportionately with the rest to general average and sal-

[1] Per Cockburn, C.J., in *Hendricks* v. *Australian Insurance Co.* *L.R.* 9 *C.P.*, 465, 466; see also *Harris* v. *Scaramanga*, *L.R.* 7 *C.P.* 481; and *Stewart* v. *West India and Pacific S.S. Co.*, *L.R.* 8 *Q.B.* 362.

vage, in no way depends upon the insurance policy. "It is a consequence of the perils of the sea, first imposed, as regards general average, by the Rhodian Law many centuries before insurance was known at all, and, as regards salvage, by the maritime law, not so early, but at least long before policies of insurance in the present form were thought of. No claim for remuneration from the owner is given by the Common Law to those who preserve goods on shore, unless they interfered at the request of the owner."[1]

"The laws of all civilised nations, the laws of *Oleron*, and our own laws in particular, have provided that a recompense is due for the saving, and that our own law has also provided that this recompense should be a lien on the goods which have been saved. Goods carried by sea are necessarily and unavoidably exposed to the perils which storms, tempests and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who save them that they are saved. Principles of public policy dictate to civilised and commercial countries not only the propriety but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in so dangerous a service. . . . Such are the grounds upon which salvage stands; they are recognised by Lord Chief Justice Holt in

[1] Per Lord Blackburn in *Aitchison* v. *Lohre*, 4 *App. Cas.*, 760.

Hartfort v. *Jones*."[1] Salvage expenses are not assessed upon the *quantum meruit* principle; they are assessed upon the general principle of maritime law, which gives to the persons who bring in the ship a sum quite out of proportion to the actual expense incurred and the actual service rendered, the largeness of the sum being based upon this consideration—that if the effort to save the ship (however laborious in itself, and dangerous in its circumstances) had not been successful, nothing whatever would have been paid. "If the payment were to be assessed and made under the suing and labouring clause, it would be payment for service rendered, whether the service had succeeded in bringing the ship into port or not."

Salvage is only chargeable in respect of a peril covered by the policy. "No wrong-doer can be allowed to apportion or qualify his own wrong, and where a loss has actually happened whilst his wrongful act was in operation and force, which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done."

A question of some importance is the principle upon which the liability of underwriters ought to be determined when the ship has been damaged by the perils of the sea, and has been sold during the con-

[1] Lord Raymond, p. 393, quoted by Lord Blackburn in *Aitchison* v. *Lohre* (above).

tinuance of the risk without being repaired, in a case where the amount required to restore her to the same condition as she was in before the injury would have largely exceeded the value of the ship when repaired, so that no reasonable man would have repaired her. It may be answered by stating that (as we have more than once pointed out), since the contract of insurance is a contract of indemnity to the insured against the loss incurred by him through the ship being injured by the perils of the sea, it follows that as a general rule in no case can the insured become richer by reason of these perils. In other words, that the insured ought not to be entitled to receive from the insurer a larger sum for a single partial loss than if the ship was wholly lost. Treating this as in effect a constructive total loss, the amount recoverable would be an amount not exceeding what would be recovered as on a total loss. As to the value, the value to be regarded is the value of the ship at the port of departure. Both on principle and authority the rights of a shipowner who actually repairs his vessel when damaged by the perils of the sea, to recover the amount or a portion of the amount expended in repairs from the underwriters are not in all cases the same as those of a shipowner who declines to repair because the ship is not worth repairing, and who therefore sells the ship during the risk.[1] "The following propositions are all, it is believed, recognised as true in insurance law. The assured is not under any circumstances *bound* to sell his ship. The assured

[1] See *Pitman* v. *Universal Marine Insur. Co. in Ct. of App.*, 9, *Q.B.D.*, 203.

may under any circumstances sell his ship. He is entitled under any circumstances to repair his ship. He is not *bound* under any circumstances to repair his ship . . . there is nothing in the contract of insurance which takes away from the assured the absolute power and right to do with his own property what he will. The assured, therefore, can always, whatever be the amount of damage done to his ship, repair her. If he does repair and keep the ship, there cannot be a total loss; the loss then must be a partial or average loss leaving open the question of how such loss is to be adjusted. But in the case of a partial or average loss there is no salvage. Therefore, in such a case, if the cost of repairs actually done in a reasonable way, at a reasonable cost, so as to make the ship equal to what she was before the accident, equals or exceeds 100 per cent. of the sum insured, the assured, in respect of such average loss on ship, recovers 100 per cent. of the sum insured, without any deduction. That was the decision in *Lohre* v. *Aitchison* (*sup.*). The assured need not repair. If he does not, but leaves her unrepaired until the end of the risk, no subsequent total loss intervening, then he is to be compensated as if he had repaired, only that the cost of the repairs he might have made must be determined by estimate instead of by actual expenditure. This proposition is undoubtedly supported in terms by high authorities. 'If the *damage done* to the ship has not been repaired, the *only* mode of ascertaining *its* amount is by the estimate of surveyors. Where, however, *the damage* has been repaired, the established mode of estimating *its* amount is, in case

of wooden ships, to deduct one third from the whole expense, both of labour and materials which the repairs have cost, and to assess *the damage* at the remaining two thirds.'" [1]

[1] See also *Arnould on Insurance*, part 3, cap. 5, 5th edit., p. 901.

CHAPTER X.

Abandonment—Interest which an Assured may have in Certain Cases to convert Partial Loss into Total Loss—English Law furnishes few, if any, Examples of the Subject of Abandonment prior to Lord Mansfield's Time—The well-known Principle of English Law in Reference to Abandonment—Recovery upon Contract with the Insurers no Bar to Claim to Damages.

WHERE there has been a loss, an undoubted loss, a loss which the assured could not by reasonable means prevent, and that loss flowed immediately from the wreck, the wreck being occasioned by the perils of the seas which were insured against by the underwriters, then in all cases of this nature the plaintiff will be entitled to judgment.[1]

When the thing insured has, by some of the usual perils of the sea, become practically valueless, the assured may relinquish to the assurers his right to what is saved out of the wreck. Such relinquishment is called an "abandonment". In such a case, the assured can call upon the assurers to pay the full amount of the insurance, as if the loss were an actual total loss. A loss of such a kind is called a "*constructive total loss*". The abandonment must be entire and absolute, and if it is accepted it is irrevocable. In order that a person may

[1] See *Dent* v. *Smith*, *L.R.*, 4 *Q.B.*, 414.

make an abandonment he must have the absolute right of ownership in the subject insured. In insurance law it is a principle that no abandonment is necessary where there is nothing which, on abandonment, can pass to, or be of value to the underwriters.[1] In principle, there is no difference between an *express* and a *constructive* acceptance of an abandonment. The effect produced upon the rights of the parties is the same in both cases. Assume that the defendants (underwriters) in an action, upon the receipt of the notice, had written to the plaintiff, and said that, as the loss took place in the Gulf of St. Lawrence, after such and such a date they did not consider themselves in strictness liable to make good the loss; that they found upon inquiry that their agent, through whom the insurance was effected, was under the impression that that part of the warranty which declared that the vessel was not to be in the Gulf of St. Lawrence after a certain date, applied merely to the case of its going west, and that under those circumstances, they did not consider it right to avail themselves of the breach of warranty; that they accepted the abandonment and would make the best they could for themselves of the salvage, and would settle as for a total loss, in such a case the plaintiff could not have treated the notice of abandonment as a nullity.[2] "If the subject-matter of insurance ultimately exists *in specie*, so as to be capable of being restored to the hands of the assured, there cannot be a total loss, unless there has been an abandonment. Now, in

[1] See *Rankin* v. *Potter*, *L.R.*, 6 *H.L. Ca.*, 83.

[2] See *Provincial Insurance Co.* v. *Leduc*, *L.R.*, 6 *P.C.*, 242, 243.

order to justify an abandonment, there must have been in the course of the voyage that which at the time constituted a total loss. Thus, capture or the necessary desertion of the ship constitutes a total loss".[1] Moreover, where goods were so injured by the perils of the sea that they would have been destroyed by putrefaction before they could arrive at their destination, and were consequently sold, the assured was at liberty to treat the loss as a total loss, without giving notice of abandonment.

"The interest which the assured may have in certain cases to convert a partial loss into a total loss, may be a fair argument to a jury upon a doubtful question of fact as to the nature of the loss or the motive for the abandonment; and in the same view that interest has been adverted to occasionally by judges where the conclusions to be drawn from facts upon a special case, or upon a motion for a new trial, were open to discussion. But there is neither authority nor principle for the distinction in point of law; whether a loss be total or partial in its nature must depend upon general principles."[2]

We may point out that the history of the English law furnishes few, if any, examples of the subject of abandonment prior to the time of Lord Mansfield.

Lord Mansfield found it necessary to resort to foreign codes, and to the opinions of foreign jurists for the rules and principles which he laid down in the

[1] See *Holdsworth* v. *Wise*, 7 *B. & C.*, 794, and *Parry* v. *Aberdein*, 9 *B. & C.*, 411.

[2] Per Lord Abinger in *Roux* v. *Salvador*, 3 *Bing.* (*N. C.*), 277 278.

leading cases of *Goss* v. *Withers*[1] and *Hamilton* v. *Mendez*.[2]

Notwithstanding, it should be particularly borne in mind that however the laws of foreign states upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. The whole doctrine of abandonment in English law is founded upon that principle. "The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases—there may be a capture, which, though *primâ facie* a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to terminate in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar

[1] 2 *Burr.*, 683. [2] 1 *W. Black*, 276.

cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of total loss and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value.

"In all these cases not only the thing assured or part of it is supposed to exist *in specie*, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the assured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before.

In the language of Lord Ellenborough in the case of *Tunno* v. *Edwards*,[1] 'it is an established and familiar rule of insurance, that when the thing insured subsists *in specie*, and there is a chance of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be.'"

No abandonment is necessary where there is a total loss of the subject-matter insured.[2] In other words, when the subject-matter insured has, by a peril of the sea, lost its form and *species*, where a ship for example, has become a wreck or a mere congeries of planks, and, has been *bonâ-fide* sold in that state for a sum of money, the assured may recover a total loss without any abandonment. "In fact, when such a sale takes place, and in the opinion of the jury is justified by necessity and a due regard to the interest of all parties, it is made for the benefit of the party who is to sustain the loss; and if there be an insurance, the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter upon the payment by him of the total loss." [It may be proper to mention, however, that] "the assured may preclude himself from recovering a total loss, if, by any view to his own interest, he voluntarily does, or permits to be done, any act whereby the interests of the underwriter may be prejudiced in the recovery of that money." Let us assume, for example, "that the money received

[1] 12 *East*, 491.

[2] See *Mullet* v. *Sheddon*, 13 *East*, 304; and *Cambridge* v. *Anderton*, 2 *B. & C.*, 691.

upon the sale should be greater than, or equal to, the sum insured; if the assured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature."[1] There must be no delay on the part of the assured to give reasonable notice of abandonment. What is a reasonable notice depends upon the facts of each particular case.

The well-known principle of the English law in reference to abandonment is that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. "It is on this principle that the underwriters of a ship that has been lost are entitled to the ship *in specie* if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrong-doer for damage for the act which has caused the loss. But this right of action for damages they must assert, not in their own name, but in the name of the person insured, and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all."[2]

A recovery upon a contract with the insurers is no

[1] See *Mitchell* v. *Edie*, 1 *T.R.*, 608.

[2] The Lord Chancellor in *Simpson* v. *Thompson*, 3 *App. Cas.*, 284.

bar to a claim to damages against the wrong-doer.[1] The right of the underwriters is merely to make such claim for damages as the assured himself could have made, and it is for this reason that (according to the English mode of procedure) they would have to make it in his name; and if this is so it cannot of course be made against the insured himself.[2] Underwriters have the clearest right to *use the name of the assured* in order to reimburse themselves.

It is settled law in the case of a policy of re-insurance that if a constructive total loss has happened no notice of abandonment is necessary.[3]

[1] *Mason* v. *Sainsbury*, 3 *Doug. Rep.*, 61.
[2] See *Simpson* v. *Thompson* (*sup.*).
[3] See *Uzielli* v. *Boston Marine Insurance Co.*, 15 *Q.B.D.*, 18.

CHAPTER XI.

Case of *Denoon* v. *Home and Colonial Assurance Co.*—Under Circumstances of Stringent necessity Master of Ship may effect a Sale of Ship—The Circumstances which will justify Master of Ship in Selling—Case of *Cobequid Marine Insurance Co.* v. *Barteaux.*

IN a case which came before the courts in the year 1872, the defendants underwrote for £1,000 on a policy of marine insurance, expressed to be "upon a chartered freight valued at £7,000 at and from Sydney to Calcutta and London. The terms of the policy were that the risk was to commence from the loading of the said goods or merchandise, and to continue until they were safely landed. When the ship arrived at Calcutta the voyage to England was abandoned in consequence of the failure of the charterers, and the ship was employed for the conveyance of 360 coolies and 1,200 bags of rice to the Mauritius. When the plaintiff (the assured) heard this, he procured an alteration of the policy, by an insertion of a memorandum in the margin, altering the voyage and declaring the interest to be on freight valued at £2,000. The plaintiff's intention in effecting this insurance was to insure the freight of the rice only, but this intention was not communicated to the defendants. No binding custom of trade limiting the meaning of the term freight was proved; but the most frequent course in

insurance business, where freight of coolies is intended, is to describe it as freight of coolies, or by some other term distinguishing it from freight of merchandise. The rate of premium differs for the insurance of passage money of coolies and freight of goods. The vessel was wrecked, and there was a total loss of the rice, and consequently of the freight of the rice, but the coolies, with the exception of twelve, were saved, and their passage money, which was payable on arrival, paid. The plaintiff sued the defendants to recover, as on a total loss, the amount underwritten, being the half of the total value declared in the policy. The defendant's contention was that there was only a partial loss, as the freight or passage money of the coolies must be taken to be included in the term "freight" used in the policy. It was decided that the question whether the term "*freight*" in a marine policy includes passage money must depend upon the circumstances of each particular case, and the context of the particular policy, that in the case under consideration the expression "*freight*" did not include such passage money, and consequently there was a total loss of the freight insured by the policy; but that inasmuch as the valuation of freight in a valued policy generally refers to a full cargo, or the charter of the entire ship, and there was in this particular case nothing to show the underwriter that the valuation was less than such full freight, the valued policy as applicable to a partial cargo must be treated as an open policy for half the loss of freight, not exceeding in any case £1,000.[1]

[1] See *Denoon* v. *Home and Colonial Assurance Co.*, *L.R.*, 7 *C.P.*, 341.

The master of a vessel, under circumstances of stringent necessity, may effect a sale of the ship so as thereby to affect the insurers. That he can do so in cases of such stringent necessity has been laid down in a great variety of cases.[1] Parsons also takes the distinction between the rule that a sale is justified by stringent necessity only, and what was sometimes supposed to be a rule, that the sale would be justified if made under circumstances that a prudent owner uninsured would have made it. He distinguishes between the two, and establishes, upon satisfactory authority, that whilst what a prudent owner would have done under the circumstances if uninsured may illustrate the question as to how far there was a stringent necessity for selling, yet that the rule is that there must be a stringent necessity.

The circumstances which will justify the master in selling are well and clearly put in *Arnould on Insurance*.[2] "The exercise, however, of this power"—that is the power of the master to sell—"is most jealously watched by the English Courts, and rigorously confined to cases of extreme necessity. Such a necessity, that is, as leaves the master no alternative, as a prudent and skilful man, acting *bonâ fide* for the best interests of all concerned, and with the best and soundest judgment that can be formed under the circumstances except to sell the ship as she lies; if he come to this conclusion hastily, either without sufficient examination into the actual state of the ship, or without having previously made every exertion in his power

[1] See *Parsons on Insurance*, vol. 2, p. 147.

[2] See 4th Edition, vol. 1, p. 333.

with the means then at his disposal to extricate her from the peril, or to raise funds for the repair, he will not be justified in selling, even although the danger at the time appear exceedingly imminent."

"That seems to be the *true rule* to apply in these cases where it is most important to confine within strict limits the powers of a master to sell the ship."[1]

[1] See *Cobequid Marine Insurance Co.* v. *Barteaux*, *L.R.*, 6 *P.C.*, 324, per Keating, J.

CHAPTER XII.

When Goods of different Owners become by Accident mixed together as to become Undistinguishable—Cases of *Gray* v. *Pearson*—*The Lion Insurance Co.* v. *Tucker*—*Muirhead* v. *Forth and North Sea Mutual Insurance Association.*

WHEN goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportions which they have severally contributed to it.[1] Moreover, where goods are mixed so as to become undistinguishable, by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion, or any part of the property from the other owner. But no such principle has ever been applied, nor, indeed, can it be applied to the case of an *accidental mixing* of the goods of two owners; and there is neither authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners and become *bona vacantia* (*i.e.*, goods without an owner).

An action was brought by plaintiffs to recover contributions or calls due, not to them, but a body

[1] See *Buckley* v. *Gross*, 3 *B & S.*, 566.

which they in the capacity of managers represented. There was no privity (*i.e.*, contractual relation) between the plaintiffs and defendant, the contract having been made between the defendant and the other members of the association. A power of attorney enabled the plaintiffs to sue, not in their own names, but in "the several and respective names" of the members of the association. This was an attempt to do that which had been frequently but fruitlessly attempted before, namely, to get rid of the difficulty of a large number of persons suing in their own names—to appoint a public officer without obtaining an Act of Parliament or a charter of incorporation. It was decided, that the manager could *not* maintain an action against a member for premiums due from such member, or for moneys paid by the manager out of the funds of the association in respect of such members' share of losses due to other members.[1]

In one case[2] the plaintiffs appealing were a mutual marine insurance association, limited by guarantee, and incorporated under the Companies Act, 1862, and the defendant was a member of that association. The association was being wound up, and the action was brought for the defendant's contribution in respect of certain losses which had happened before the winding-up. Those contributions exceeded the sum of £5, and the Queen's Bench Division had held that the defendant was not liable to a greater contribution than such

[1] See *Gray* v. *Pearson*. *L.R.*, 5 *C.P.*, 568, and *Evans* v. *Hooper*, 1 *Q.B.D.*, 45.

[2] *Lion Mutual Marine Insurance Association* v. *Tucker*, *L.R.*, 12 *Q.B.D.*, 176.

£5. The case on behalf of the plaintiffs was, that in respect of the losses for which contribution was sought the defendant was an insurer, and that the moment those losses occurred he became indebted to the association *in form*, but to the persons who had suffered the losses *in reality*, for his contribution to those losses. It was asserted on behalf of the plaintiffs that that debt was an asset of the association, which was not affected by the sections of the Companies Act of 1862, which were relied upon by the defendant. On the part of the defendant it was argued that this association was a company within the ninth section of the Companies Act, 1862, and that under those circumstances it was necessary that there should be a declaration in the memorandum of association limiting the liability of the members, and that there was in the memorandum such a declaration, and that it did limit the liability of every member in the case of a winding-up to £5, and that consequently by section 38 of the Companies Act, 1862, the defendant could not be made liable beyond that amount. The Court of Appeal said that the case must depend upon what was the true construction of the statute, the cardinal rule in construing a statute or document being that it was not to be construed according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they were used, unless there was something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied; and the Court decided that on the true construction of the

statute the judgment of the Queen's Bench Division was wrong, and that the defendant was liable to pay his proportion of losses in respect of vessels entered and insured in the same class as his own.

The able and exhaustive judgment of Brett, L.J. (M.R.), in this case is so valuable a contribution to the law on the subject that no apology is needed for reproducing it here:—

"What is the subject-matter with which the statute is dealing, and with which this declaration in these articles[1] of association is dealing? In the statute there are other associations to which the statute is applicable. In these articles[1] of association the subject-matter is a mutual marine insurance association. The statute applies to such an association, but also to other associations, and the articles of association apply to such an association. The question then is, what is the true construction of the statute and of the articles of association as applied to the subject-matter with regard to which they are used, namely, an association of mutual marine insurance. Now a mutual marine association is a well-known mercantile association. The rules of the association which are endorsed on the policies or are otherwise in the documents of the society, constitute the relation as amongst its members of a mutual marine insurance association. Men become members of that association by placing a ship of theirs in the association for the purpose of that ship being insured by certain of the other members.

"By the rules when that ship is placed in the

[1] So in the judgment, but *memorandum* is clearly meant.

association the amount for which the owner desires that she should be insured is named and the class is named. By putting his ship into the association the owner becomes a member of the association, but does he become simply a member, or does he become a member and something more? He becomes an assured, for his ship is insured by the other members who have put their ships into the society, and have become members in the same class as his own; but by the same act by which he becomes an assured he also becomes an insurer of other ships. Treating him as an assured, what is the meaning of being assured in insurance law? It is that in respect of a consideration moving from him to others due or payable to them, or in respect of which he is liable to them, whether there is a loss or not, he is insured to the extent to which he has insured himself in case of a loss. Now that consideration moving from him in respect of which he is insured, is in insurance law called a premium, usually that premium is a sum of money, but it is not necessary that it should be such, and it may be some other liability than the payment of money. Therefore, by being an assured, the person assuring is liable to that which in its largest sense is called a premium, and in respect of that premium in case of a loss he is entitled to an indemnity. Now when a loss in such a society as this occurs, which is not the loss of the person whose ship is insured treating him as an assured, the premium that he is to pay is a liability to contribute to the loss of the other members of his class when they lose. That is his liability in respect of which he is insured. There-

fore treating him as an assured, when there is a loss of other ships in his class, he is bound to pay them their loss, but that is paying the premium on his own policy if you treat him as an assured. If you treat him as an insurer, the premium which is payable to him as an insurer is the indemnity for the loss to him, if a loss occurs to his vessel. The premium paid to him is the right to have the loss of his vessel, if it occurs, indemnified to him by others, and in respect of that premium, when a loss occurs to other people, treating him as an insurer, he is bound to pay such loss. He is either to pay that loss as the premium on his policy treating him as an assured, or is to pay the loss on the other policies treating him as an insurer. In neither case does he really owe that to the association, if you take the association to mean all the other members of it but himself. He is really liable to the members whose vessels have been lost to contribute to that loss, but on account of the difficulties of procedure in such a case it was agreed between him and the other members when he became a member, and the law allows it, that in that case he should not be sued by the individual owners, but by the association. He is sued by the association, on behalf of those members of his class who have suffered the loss, for that which is a debt, the moment the loss is adjusted, due from him to such other members, though in form he is sued for it as a debt due from him to the association. Now what is a man who has undertaken those relations? There is no doubt he is a member of the association, but he is something more; he is a person insured by some of the members of that association,

and he is an insurer of some of the members of that association. Therefore he is not only a member, but also an insurer and an assured; he is all three. It must be obvious that in such societies as these there should be expenses and liabilities of the association, taking the association as a whole, such as the officers and offices of the association, and many other things which are expenses different from the liabilities or debts which are the result of the insurance, because it must be observed that there is no liability with regard to any insurances until there is a loss. There is no premium paid, nor liability to pay for a loss until there is a loss, but there must be expenses even although there never was a loss; there would be the expenses of the secretary if the association had one, or of the manager if it had one, or of an office if it had one, and therefore there would be expenses in respect to which the association must look to its members as members. There are also liabilities of the members not to the association as a whole in fact, but amongst each other in reality, and in form to the association. Now I take that to be the subject-matter with which this Act of Parliament and these articles of association are dealing. Then section 9 says: (His Lordship here read section 9). Then section 38 says 'In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association'. What is the meaning of the word '*contribution*' there? It seems to me that it is contribution as a member. Then if that be so, now let us apply to it the declara-

tion in the memorandum of association. (His Lordship here read the fifth clause of the memorandum of association.) He is, therefore, to contribute to the assets of the association. What for? 'For payments of the debts and liabilities of the association'. In one sense the amount of these losses for which this action is brought may be said to be a debt and liability of the association; but is it so within the meaning of the Act of Parliament and of this fifth clause? It seems to me it is not. I think that the debts and liabilities mentioned in this fifth clause are the debts and liabilities in respect of which a declaration was necessary in the memorandum or articles of association under the Act, and those are the debts and liabilities of the company or association as against its members as members only, and to which they must contribute as members and not as insurers or as assured. If that be so, the limit of £5 is a limit of the liabilities of the member in respect of the liabilities of the association to which he can be required to contribute as member, but not in respect of the debts and liabilities of the association for which it can nominally be sued, but which are not really debts and liabilities of the association at all, but of certain members to other members of the association. This defendant was liable to pay in reality to other members of the association, either as an insurer his part of the loss which they had incurred or, if he be treated as an assured, the premium in respect of which he himself would have been insured in case of a loss. Because he delays to pay until after there is a winding up of the association, it is

said that, although all the other contributories who paid in time were bound to pay the whole, and did pay, yet the defendant shall take advantage of his own delay in paying and be allowed to say on account of that delay 'I am bound only to pay £5'. That may be the grammatical meaning of the fifth clause of the memorandum of association, but if it is the meaning, it leads to absurdity and gross injustice, whereas if it be read in another way, to which the words are equally applicable, it does that which is just, and leaves him liable to pay as he would have had to pay if there had been no liquidation for the benefit of the persons assured. It leaves him also bound to contribute, but to a limited amount, namely that of £5, to the expenses of the association which would have been expenses whether there had been a loss or not.

"Reading the statute and also the articles or memorandum of association as applying to the subject-matter to which in this case they are applied, namely, a mutual insurance association, one reading is sensible and just, and according to the ordinary modes of business, whilst the other is senseless, unjust, and absurd. Which, then, is the right way to read the words? It seems to me that the right way for the court to construe words which are applicable to two cases, and which will produce two results, one of which is ridiculous and the other just and according to business, is to read them so as to carry out that which is just and honest and business-like."

A policy provided that the "*provisions contained in the articles of association shall be deemed and considered*

part of this policy". It was decided by the House of Lords, that according to the right construction of this contract the articles of association referred to in the policy must be taken to be those articles which had been duly registered, and under which the company was trading at the date of the contract.[1]

[1] See *Muirhead* v. *Forth and North Sea Mutual Insurance Association* [1894], *H.L., App. Cas.*, 72.

CHAPTER XIII.

Liability of Shipowners where two Ships in Collision and both Damaged—Cases of *Stoomvart Maatschappy Nederland* v. *P. & O. Steamship Co. (The Khedive)*—*Good* v. *London Steamship Owners Association*—*Field Steamship Co.* v. *Burr*—*Hogarth* v. *Walker*—*Ruabon Steamship Co.* v. *London Assurance.*

IF two ships have come into collision and both are damaged, both being to blame, according to the Admiralty law, there can be only one liability. "Conceivably there may be none, if the damages to the two vessels respectively are exactly equal. But if the damage to one ship exceeds the damage to the other, there will be a monition that the owners of the ship least damaged shall pay to the owners of the other ship half the difference between the amounts of damage sustained by the two ships respectively." And as there is only one liability there can be only one payment. It matters not whether the actions are heard together or not. The Court of Admiralty has held that, where one suit was heard at one time, the other suit must be heard before the monition is issued, and it must be withheld until the cross suit should be brought to hearing. "The amount of the conjoint damage has to be divided equally, and in order to do this there must be a sum in arithmetic stating the amounts

respectively; but as the result of the arithmetic, there is only one liability, not cross liabilities."[1]

An association of steamship owners agreed by deed to indemnify each other, in respect of ships entered by them in the association against (amongst other things), "loss or damage which, by reason of the improper navigation of any such steamship as aforesaid, may be caused to any goods, etc., on board such steamship". It was decided that improper navigation within the meaning of that deed was something done with the ship or part of the ship in the course of the voyage. As an illustration. Suppose the ship were anchored in a place where she ought not to have been anchored *without a light*, and a collision took place in consequence, clearly that would be a damage arising from improper navigation—an omission properly to navigate the ship. In the case under consideration, the bilge-cock having been opened for the purpose of getting water out of the ship, and having been negligently left open, the sea-cock was opened for the purpose of getting in water to work the ship. "The omission to close the bilge-cock was clearly improper navigation within the meaning of this deed. It was improper navigation within the course of the voyage."[2]

In a case which came before the Court of Appeal in 1899, the question was whether a shipowner, insured under a policy of marine insurance covering hull and machinery against perils of the sea, is entitled, in the

[1] See *Stoomvart Maatschappy Nederland* v. *P. & O. Steamship Co.* (*Khedive*), 7 *App. Cas.*, 795.

[2] See *Good* v. *London Steamship Owners Association*, *L.R.*, 6 *C.P.*, 563.

case of damage to hull and machinery by a sea peril, to recover from his underwriters the cost of discharging the cargo, which has become putrid by reason of a sea peril, and is rightly refused by the consignee at the port of discharge, in addition to the damage occasioned to the hull and machinery by the sea peril. In giving his judgment in that case, Lord Justice Smith said (*inter alia*) "In my opinion, unless the case is concluded by authority, the best and safest way to arrive at a true decision as to what is recoverable under a policy of marine insurance is to ascertain in the first place what constitutes the subject-matter of the insurance, and next, against what perils that subject-matter is insured. When this is arrived at, what is covered—that is, what is recoverable under the policy—will be understood."

In that case the subject-matter of the insurance was clear; it was hull and machinery, and nothing else. The peril against which that subject-matter was insured was also clear; it was the deterioration occasioned by the hull and machinery by perils of the sea. It follows, therefore, from this, that to constitute a claim upon a marine policy covering hull and machinery against sea perils, the assured must establish a deterioration to the hull and machinery by a sea peril, and this when established, the underwriter of hull and machinery is liable to make good to the assured. The shipowner has no further claim.[1]

In the same year, an action was brought on a policy of marine insurance on a ship and its furniture. The

[1] See *Field Steamship Co.* v. *Burr*, 15 *T.L.R.*, 193.

policy was in the ordinary form of a Lloyd's policy and was a time policy on the plaintiffs' ship for twelve months. The plaintiffs' ship was employed in the grain trade, and it is the recognised custom of that trade for the ships employed in it to carry separation cloths and dunnage mats for the proper carriage of her cargo under the ordinary circumstances of that trade. The question to be decided by the court was whether an ordinary Lloyd's time policy on ship, the ship being engaged in the grain trade, covers separation cloths and dunnage mats. Mr. Justice Bigham in giving judgment for the plaintiffs said: "It seems clear that under the ordinary circumstances of that trade the use of such cloths and mats would be necessary for the proper carriage of the cargo, and that if the ship went to sea without them she would be unseaworthy. Therefore they must be regarded as forming part of her furniture. I can see no distinction between them and moveable bulkheads which it was admitted by the defendants would form part of the ship's furniture. Both are intended for the same purpose, namely, to separate one part of the cargo from another."[1]

A late case on the subject of marine insurance is that of *Ruabon Steamship Company* v. *London Assurance*, judgment being delivered in the House of Lords on 14th December, 1899.[2] The facts agreed upon in that case were shortly these: The steamship *Ruabon* having been placed in dock for the purpose of repairs, for which the underwriters were liable while

[1] See *Hogarth* v. *Walker*, [1899], 2 *Q.B.*, 401, at pp. 402, 403.
[2] See [1900] *A.C.*, 6.

she was in dock, the owner took advantage of the opportunity to have the vessel surveyed. It was part of the agreed facts that the holding of the survey added not a farthing to the cost, or a moment to the period of time during which the execution of the repairs proceeded, and the question raised was whether the owner of the vessel was responsible on any reason known to the law to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs were being executed. It was decided that there was no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it. The general rule is correctly stated by Lord Herschell in the Vancouver case[1] in these words: "that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled to recover the sum properly expended in executing the necessary repairs, less the usual allowances, as the measure of his loss. Moreover, "since the decision of the *Vancouver* case, by which of course we are bound, and which to me seems to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea—one of such operations being to effect repairs for the cost of which underwriters are responsible—the other to clean and scrape the ship necessitated by wear and tear, the

[1] 11 *App. Cas.*, 573.

cost of which must be borne by the owners themselves, and neither of such operations could be performed unless the ship were dry-docked, and both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous dry-docking; in such cases the cost of docking, and all dock dues during the period the vessel is in dock, must be shared in proportion, having regard to the period of joint or separate actual use of it."[1]

[1] Per Lord Brampton in same case.

CHAPTER XIV.

Assignment of Policy—Where Effective Assignment Impossible—Where Assignees of Marine Insurance Policy bring an Action—Cases of *Burger* v. *Indemnity Marine Insurance Co.*—*Turnbull & Co.* v. *Hull Underwriters Association*—*Sleigh* v. *Tyser*—Cases of The *Dora Forster*—*Lawther* v. *Black*.

A POLICY of marine insurance may be assigned, after loss, so as to entitle the assignee to sue upon it in his own name.[1]

An effective assignment of a policy of marine insurance is impossible where the policy has not been assigned until after the interest of the assignors has ceased. If there was a stipulation in the contract that the policy should be assigned for the benefit of the plaintiffs, the purchasers, it may be otherwise.

Where the assignees of a policy of marine insurance bring an action, the insurers are not entitled to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment.

The words "*at and from*" in a homeward policy of marine insurance must be construed in their natural

[1] See *Lloyd* v. *Fleming* and *Lloyd* v. *Spence*, *L.R.*, 7 *Q.B.*, 299.

geographical sense, without reference to the expiration of an outward policy "*to*" the same place, and therefore the policy attaches as soon as the vessel arrives within the port named, and although not *safely moored.* As an illustration. A vessel assured at and from Havana and injured by coming in contact with an anchor, after entering the harbour, and during her passage up to her place of discharge.[1] On the other hand, if the words "*at and from*" a port are used in a voyage policy of insurance, it is an implied understanding that the ship shall be at the port within such a time that the risk shall not be materially varied; and if there is delay beyond such a time, the policy does not attach.[2] Moreover, the words "*at and from a particular place*" do not import either a warranty or a representation that the vessel at the time of making the policy is already at the place; but it is an implied understanding that the ship shall be at the port within such a time that the risk shall not be materially varied; and if there is delay beyond such time, the policy does not attach.

A policy of assurance will be construed by the same rules as other contracts, the duty of the Court being to collect the parties' meaning by taking the language employed in a plain and ordinary sense, and not to speculate on some supposed meaning, which they have not expressed.

In the case of *Burger* v. *Indemnity Mutual Marine Insurance Company* which came before the Court of

[1] See *Haughton* v. *Empire Marine Insurance Co.* 1 *L.R., Ex.*, 206.

[2] See *De Wolf* v. *Archangel Maritime Bank and Insurance Co. L.R.*, 9 *Q.B.*, 451.

Appeal in June, 1900, the question considered was, what was the true construction to be put upon the collision clause in the policy in the following terms: "And we further agree that, if the ship hereby assured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof be found liable to pay, and shall pay, any sums (not exceeding the value of the ship hereby assured) in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we will severally pay the assured such proportion of three-fourth parts of said sums as our respective subscriptions hereto bear to the value of the ship hereby assured . . . but this agreement is in no case to be construed as extending to any sums the assured may become liable to pay in respect of loss of life or personal injury to individuals from any cause whatever." It was decided, that the meaning of the words "sums . . . in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel," enumerated the subject-matters against which the underwriters undertook by the collision clause to indemnify the assured, and, taken as they stood, needed no explanation. The true construction of its terms was intended to be limited to three heads, namely, injury to the other vessel itself, injury to the goods and effects on board of her, and loss of freight then being earned by her, and was not intended thereby to make the insurers liable for every sum which the assured might have to pay in consequence of the ship insured coming into collision with another ship.

In another case, the risk was described in the following terms: "At and from London to any port or ports $\frac{\text{and}}{\text{or}}$ place or places in any order or rotation in Australia $\frac{\text{and}}{\text{or}}$ Tasmania $\frac{\text{and}}{\text{or}}$ New Zealand, risk to continue until steamer sails from the final loading port on homeward voyage". The subject-matter was described as follows: "upon freight of frozen meat, chartered or as if chartered, on board or not on board, full interest admitted". The policy also contained this special clause: "Chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise". In that case, it was not disputed that the words "*or otherwise*," meant other perils insured against. It was held that the underwriters were not liable on that policy of marine insurance.[1]

In the case of *Sleigh* v. *Tyser*,[2] the action was brought on a Lloyd's policy to recover from the defendant his proportion of the amount payable in respect of a loss of cattle shipped at Brisbane in the steamer *Ningchow* for carriage to Lourenço Marques in Delagoa Bay. The defence was that the ship was unseaworthy for the carriage of the cargo because of want of proper appliances for ventilation, and because she carried an insufficient number of cattlemen to attend to the beasts. The reply to that defence consisted of a denial of the unseaworthiness and of an allegation that the implied warranty of seaworthi-

[1] See *Turnbull & Co.* v. *Hull Underwriters Association* [1900] 2 *Q.B.*, 402.

[2] 16 *T.L.R.*, 404 [1900].

ness was excluded by the express terms of the policy. February 10th, 1899, was the date of the policy, and the subject-matter of the insurance was described as '500 cattle valued at £14 each". The premium was fifteen guineas per cent., but to return three per cent. for no claim. The insurance was expressed to cover "all risks of shipping, unloading craft, etc., until safely landed; all risks including mortality and jettison arising from any cause whatever; animals walking ashore or when slung from the vessel, walking after being taken out of the slings, and landed, to be deemed arrived, and no claim to attach to this policy on such animals. Each animal to be deemed a separate insurance. Fittings and conditions of the cattle to be approved by Lloyd's agents' surveyor." It was held in that case, that the ship was unseaworthy in both respects, although the fitting of the ship had been approved by Lloyd's surveyor, that the implied warranty of unseaworthiness was not excluded by the provision as to the approval of the fittings, and that the underwriter was not liable.

Under section 1 of the statute 19, George II., cap. 37 (now repealed by the Marine Insurance Act, 1906, 6 Edw. VII., c. 41), a policy of marine insurance whereby the assured was entitled to be indemnified against loss in respect of the non-arrival of a vessel at a particular port by a certain date was a policy of marine insurance within the meaning of that Act.[1]

The case of the *Dora Forster*[2] raised the question whether the defendant underwriters were entitled

[1] See *Gedge* v. *Royal Exchange Insurance Corporation* [1900], 2 *Q.B.*, 214.

[2] [1900], *L.R.*, *P.*, 241.

to recover back a payment made by them to the assured on account of a particular average contribution, and could also decline to pay the assured the balance, though the cost of the repair of the damage to the vessel, which constituted the particular average loss, had been paid for but not—in the circumstances which had happened—by the assured. Shortly stated, the facts were these: Under a policy of insurance dated 13th July, 1898, the *Dora Forster* was insured by the plaintiffs with the defendants in the sum of £800, for twelve calendar months from 3rd July, 1898, to 3rd July, 1899, the value of the vessel for the purposes of the policy being agreed at £16,000, namely, hull, £11,000, machinery, £5,000. This constituted the subject-matter of the insurance. The vessel having been duly chartered, during the voyage out in ballast, and during the continuance of the policy, by reason of perils insured against, sustained damage, and after the master had obtained an estimate of the necessary repairs, they were duly carried out. The ship was totally lost on the homeward voyage. It was decided that the shipowners could not recover, as they were never personally liable for the cost of the repairs, and had sustained no loss, the amount of the draft, on the loss of the ship having been paid to the charterers by their insurers; secondly, that the underwriters were entitled to a return of the amount paid on account as a payment made without prejudice and under a mistake of fact.

An action was brought to recover a total loss on a policy on disbursements on a ship. The voyage in respect of which the insurance was effected was de-

scribed on the policy in the following terms: "At and from Antwerp towed to Cardiff and (or) Penarth both or either and in any order while there and thence to port or ports of discharge in any order on the west coast of South America with leave to call at all or any ports or places in any order on the voyage for all purposes. Held covered in case of deviation or change of voyage at a premium to be arranged." The subject-matter of the insurance was "disbursements and (or) advances warranted free from all average" valued at £3,000. The defendant was an underwriter at Glasgow, who had with others subscribed the policy. Witnesses were called on behalf of the defendant as to the customary meaning of a policy on disbursements, and they gave evidence to show that policies on disbursements had been in use for many years. The customary meaning of a policy in that form, was, that it was an insurance against total loss or constructive total loss of ship only, and they had never known a claim to be made on such a policy when the ship was *not* lost, although the voyage had been lost. Sometimes there were inserted in policies on disbursements the words "to pay only in the event of total loss or constructive total loss of ship". Such a clause was the same thing as "free of all average". It was decided that the plaintiff was not entitled to recover on the policy.[1]

[1] See *Lawther* v. *Black*, 17 *T.L.R.*, 8 [1900].

CHAPTER XV.

Act 14 George III., c. 48, s. 4—Section 335 of the Merchant Shipping Act, 1894—What Expression "Policy of Insurance" includes under the Stamp Act, 1891—Provisions of Stamp Act, 1891, Merchant Shipping Act, 1894, Revenue Act, 1903, and Finance Act, 1901, in reference to Policies of Marine Insurance.

IT will be seen that the statutes enumerated in the second schedule of the Marine Insurance Act, 1906 (see Appendix II.), namely, 19 George II., c. 37; 28 George III., c. 56 (so far as it relates to marine insurance); and 31 and 32 Vict., c. 86, are now repealed by the statute just mentioned.

By 14 George III., c. 48, section 4, it is enacted that nothing in that Act contained shall extend, or be construed to extend, to insurances *bonâ fide* made by any person or persons, on ships, goods, or merchandises; but every such insurance shall be as valid and effectual in the law as if that Act had not been made.

By section 335 of the Statute 57 and 58 Vict., cap. 60, it is provided that a policy of assurance effected in respect of any steerage passage, or of any steerage passage or compensation money by any person by the Merchant Shipping Act, 1894, made liable, in the events aforesaid, to provide such passage or to pay such money, or in respect of any other risk under that part of the Merchant Shipping Act, shall not be invalid

by reason of the nature of the risk or interest sought to be covered by the policy of assurance. Furthermore, by section 506 of the same statute it is provided that an insurance effected against the happening, without the owner's actual fault or privity of any or all of the events in respect of which the liability of owners is limited under this part of that Act, shall not be invalid by reason of the nature of the risk.

For the purposes of the Stamp Act, 1891 (54 and 55 Vict., cap. 39), the expression "*policy of insurance*" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "*insurance*" includes assurance. A contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Amendment Act, 1862, now repealed by the M. S. A., 1894, sections 502, 503 and 506 of which take the place of sections 54 and 55 of the repealed Act) shall not be valid unless the same is expressed in a policy of sea insurance. Moreover, no policy of sea insurance made for time can be made for any time exceeding twelve months. A policy of sea insurance will not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months. Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty

as a policy for time. The expression "policy of sea insurance" means any insurance (including reinsurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance. Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss or damage, such agreement or engagement shall be deemed to be a contract for sea insurance.

By section 502 of the statute just named it is enacted that the owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely: (i.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship, or (ii.) where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his

ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, or damaged or lost by reason of any robbery, embezzlement, making away with, or secreting thereof. By section 503 it is further enacted that the owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; that is to say: (*a*) Where any loss of life or personal injury is caused to any person being carried in the ship; (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; (*c*) where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond the following amounts, etc.

By section 506 of the Merchant Shipping Act, 1894, an insurance effected against the happening, without the owner's actual fault or privity, of any or all of the events in respect of which the liability of owners is limited under this part of this Act, shall not be invalid by reason of the nature of the risk.

In the case of policies on vessels in the course of construction, it is provided by section 8 of the Revenue Act, 1903 (3 Edw. VII., c. 46), that a policy of insurance made, or purporting to be made, upon or to cover any ship or vessel, or the machinery or fittings belong-

ing to the ship or vessel whilst under construction, or repair, or on trial, shall be sufficiently stamped for the purposes of the Stamp Act, 1891, and the Acts amending that Act, if stamped as a policy of sea insurance made for a voyage, and though made for a time exceeding twelve months, shall not be deemed to be a policy of sea insurance made for time.

In the year 1900 it was decided that a policy for twelve months containing a continuation clause was void. As a result of that decision, it is now provided by section 11 of the Finance Act, 1901 (1 Edw. VII., c. 7), that (1) notwithstanding anything contained in the Stamp Act, 1891, a policy of sea insurance made for time may contain a continuation clause as defined in this section, and such a policy shall not be invalid on the ground only that by reason of the continuation clause it may become available for a period exceeding twelve months; (2) that there shall be charged on a policy of sea insurance containing such a continuation clause a stamp duty of sixpence in addition to the stamp duty which is otherwise chargeable on the policy; (3) that if the risk covered by the continuation clause attaches and a new policy is not issued covering the risk, the continuation clause shall be deemed to be a new and separate contract of sea insurance expressed in the policy in which it is contained, but not covered by the stamp thereon, and the policy shall be stamped in respect of that contract accordingly, but may be so stamped without penalty at any time not exceeding thirty days after the risk has so attached; (4) that for the purposes of this section the expression "continuation clause" means an agreement to the

following or to the like effect, namely: That in the event of the ship being at sea or the voyage otherwise not completed on the expiration of the policy, the subject-matter of the insurance shall be held covered until the arrival of the ship, or for a reasonable time thereafter not exceeding thirty days. Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination, and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

If any person (*a*) becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts, or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or (*b*) makes or effects, or knowingly procures to be made or effected, any sea insurance, or directly or indirectly gives or pays, or renders himself liable to pay, any premium or consideration for any sea insurance, or enters into any contract for sea insurance, unless the insurance is expressed in a policy of sea insurance, duly stamped; or (*c*) is concerned in any fraudulent contrivance or device, or is guilty of any wilful act, neglect or omission, with intent to evade the duties payable on policies of sea insurance or whereby the duties may be evaded,

he shall incur for every such offence a fine of £100.

Every broker, agent, or other person negotiating or transacting any sea insurance contrary to the true intent and meaning of the Stamp Act, 1891, or writing any policy of sea insurance upon material not duly stamped, will for every such offence incur a fine of £100, and will not have any legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge will be deemed to be paid without consideration, and will remain the property of his employer. If any person makes or issues, or causes to be made or issued, any document purporting to be a copy of a policy of sea insurance and there is not at the time of the making or issue in existence a policy duly stamped whereof the said document is a copy, he will for every such offence, in addition to any other fine or penalty to which he may be liable, incur a fine of £100.

A policy of sea insurance shall for the purpose of production in evidence be an instrument which may legally be stamped *after* the execution of it, and the penalty payable by law on stamping the same will be the sum of £100. (*Note*—a "covering note," or "open cover," or "slip," as it is frequently called, is not a policy and cannot be stamped under this sub-section.[1])

A policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person except in the following case, namely, any policy

[1] See *Home Marine Insurance Co.* v. *Smith*, 1898, 2 *Q.B.*, 829, *C.A.*, 351.

made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within ten days, after it has first been received in the United Kingdom on payment of the duty only.

Nothing in the Stamp Act, 1891, will prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration.

CHAPTER XVI.

The Act 12 George III., c. 24—Sections 42-49 of 24 and 25 Vict., c. 97—Section 225 (1) (*f*) (2) of the Merchant Shipping Act, 1894.

BY the Act 12 George III., cap. 24, it is enacted that if any person or persons shall, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning, or otherwise destroying of any of his Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building or begun to be built in any of his Majesty's dockyards, or building or repairing by contract in any private yards, for the use of his Majesty, or any of his Majesty's arsenals, magazines, dockyards, ropeyards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed for building, repairing or fitting out of ships or vessels, or any of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval or victualling stores or other ammunition of war, is, are, or shall

be kept, placed or deposited ; then the person or persons guilty of any such offence, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy. Further, any person who shall commit any of the offences before mentioned, in any place out of this realm, may be indicted and tried for the same either in any shire or county within this realm in like manner and form as if such offence had been committed within the said shire or county, or in any such island, country, or place where such offence shall have been actually committed, as his Majesty, his heirs or successors may deem most expedient for bringing such offender to justice ; any law, usage, or custom notwithstanding.

By section 42 of 24 and 25 Vict., c. 97, it is also enacted that whosoever shall unlawfully and maliciously set fire to, cast away, or in any wise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping.

Setting fire to ships to prejudice the owner, or underwriters, is a felony, punishable in like manner. Attempting to set fire to a vessel is also a felony punishable by the maximum term of fourteen years' and not less than three years' penal servitude ; and it is a felony to place gunpowder near a vessel with intent to damage it, and damaging ships otherwise than by fire : exhibiting false signals, etc., removing

or concealing buoys, and other sea marks, destroying wrecks or any articles belonging to them.[1]

If a seaman wilfully damages his ship, or embezzles or wilfully damages any of her stores or cargo, he is liable to forfeit out of his wages a sum equal to the loss thereby sustained, and also, at the discretion of the court, to imprisonment not exceeding twelve weeks, with or without hard labour.[2]

[1] See sections 42-49 of 24 and 25 Vict., c. 97.

[2] See section 225 (1) (*f*) (2) of the Merchant Shipping Act, 1894.

CHAPTER XVII.

Cases of *Montgomery & Co.* v. *Indemnity Marine Insurance Co.*—*Nichels & Co.* v. *The London and Provincial Marine and General Insurance Co.*—*Guthrie* v. *North China Insurance Co., Ltd.*—*The Rowland & Marwood Steamship Co., Ltd.*, v. *The Maritime Insurance Co., Ltd.*

IN one case, the action was brought upon a policy of insurance subscribed by the defendant company on a cargo of nitrate on board the ship *Airlie* from the west coast of South America to the United Kingdom. The plaintiffs were the owners both of the ship and of the cargo. During the voyage the mast of the *Airlie* was cut away in circumstances which, according to the plaintiff's contention, constituted it a general average sacrifice, and the plaintiffs claimed to recover a general average loss under the policy on cargo. On the part of the defendants it was contended that the cutting away of the mast did not amount to a general average sacrifice, and that the plaintiffs had no claim under the policy, because, as cargo owners, they would not be liable to pay contribution to general average, being owners of the *Airlie* as well as of her cargo. It was decided that the liability of the defendants for the loss was not affected by the fact that the plaintiffs were the owners of both ship and cargo, and judg-

ment was therefore given for the plaintiffs with costs.[1]

In the case of *Nichels & Co.* v. *The London and Provincial Marine and General Insurance Co.* the plaintiffs claimed as interested in 810 bags of rice shipped on the Spanish ship *Serra* under a Spanish bill of lading from the Mersey for Havanna in Cuba. The material parts of the clause contained in the bill of lading were translated as follows: "In case of war, blockade . . . or other cause which may prevent the vessel entering the port to which she is bound, or that, as a consequence of such or similar events, the captain shall not consider it prudent to enter . . . the goods shall be delivered to the consignee, or, failing same, deposited at the nearest port which will admit them and which the captain may consider convenient. . . . The delivery effected by the captain at the nearest port that may receive the goods shall be considered as final delivery, the whole of the freight being considered earned." The plaintiffs effected a policy on the rice with the defendants upon "Rice war risk only; only against risks excluded by the free of capture and seizure clause . . . from Liverpool and (or) Birkenhead to all or any port or ports, place or places of call, and (or) discharge in Cuba, with liberty to call at Canary Islands". The risks thus excluded were enumerated in a slip attached to the policy in the following terms: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also

[1] See *Montgomery & Co.* v. *Indemnity Marine Insurance Co.* [1901], 1 *Q.B.*, 147.

from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war". The *Serra*, early in 1898, sailed from the Mersey when hostilities were imminent between Spain and the United States of America. She called, as was allowed, at Las Palmas, in the Canary Islands, and heard there that hostilities had broken out and that Havanna was blockaded. Under these circumstances the master did not proceed, and he accordingly returned to Liverpool. The rice was discharged at Liverpool, some being sold and some stored. The plaintiffs claimed £53 3s. 9d. for a loss under the policy in respect of the freight which had to be paid on the rice and warehouse charges at Liverpool. It was held that there was no loss upon the policy.[1]

In the case of *Guthrie* v. *North China Insurance Co., Ltd.*,[2] the action was brought by the owners of the ship *Ecclefechan* to recover a total loss under a policy on chartered freight. In the course of the voyage the ship went ashore, a notice of abandonment being given by the underwriters. The underwriters paid a total loss on ship and cargo, but the underwriters on freight did not accept the notice of abandonment. By arrangement with all the underwriters the Salvage Association entered into a contract with a salvage company to conduct salvage operations, by which a large quantity of the cargo was salved and taken to the port of destination. The Salvage Association had clearly intimated to the

[1] See 17 *T.L.R.*, 54. [2] 17 *T.L.R.*, 79.

underwriters on freight, that in entering into the salvage contract they were not making a contract which would alter the rights of the various underwriters among themselves. It was decided that judgment should be given for the plaintiffs for a total loss of the chartered freight, and that the defendants had no claim against the London Assurance Corporation.

The case of *The Rowland & Marwood Steamship Co., Ltd.*, v. *The Maritime Insurance Co., Ltd.*,[1] decided on 16th May, 1901, by Bigham, J., may next be considered. The facts of the case had been agreed upon, and the action was brought to determine the meaning of one of the rules of the Whitby Iron Steamship Insurance Co. The defendants insured the hull and machinery of the plaintiff's steamship *Roma* against various perils for twelve months. In the policy was inserted the following clause: "This policy is declared and agreed to be subject to the terms, clauses, rules and regulations of the Whitby Iron Steamship Insurance Co. . . ." Rule XXV. of the rules of the Whitby Co. is as follows: "If any ship insured in the company has been stranded or sunk, and remained in such position for a period of four months within European waters, or six months in all other parts of the world, and during such period it has been found impracticable to save her, the ship shall be held to be a constructive total loss as from noon of the day following the date of the accident, and the insured member may abandon her to the company; but this by-law shall only apply to a ship so situated,

[1] 17 *T.L.R.*, 516.

but ice-bound, when there has been four months within European waters, or six months in any other part of the world, of open water from the date of the accident".

On the 8th September, 1900, while lying at Galveston, Texas, for the purpose of loading, the *Roma* was swept away by a hurricane and rush of water, and deposited in a damaged condition at a distance of about six miles from the sea, and there left lying in shallow water. For the purpose of this hearing only it was admitted that she could be saved, but not until a railway bridge, which had been repaired after the hurricane, was made by the railway company to be a drawbridge, as it had originally been, instead of a fixed bridge, through which she could not pass. At the time of the hearing of the action the vessel was lying in the same place as on 8th September. Notice of abandonment was given on 1st October, and not accepted, and no salvage operations had been done, but surveys and soundings had been made, and tenders invited and received for the salvage of the vessel.

It was decided that the clause as set out above meant that if, notwithstanding that all practicable attempts had been made during six months to float or salve the ship, she remains at the end of that period a stranded or sunken ship the underwriters are to pay. Mr. Justice Bigham gave it as his opinion that the case was governed by *The Sunderland Steamship Co.* v. *North of England Iron Steamship Association* (14 *R.*, 196 [*C.A.*]).

CHAPTER XVIII.

Cases of *Steamship Balmoral Co.* v. *Marten—Hulthen* v. *Stewart*—*Robinson Gold Mining Co.* v. *Alliance Insurance Co.*—*Boston Fruit Co.* v. *British and Foreign Insurance Co.*—*Thorley* v. *Orchis Steamship Co.*—*Van Eijck and Zoon* v. *Somerville*—*Hull Steamship Co.* v. *Lamport and Holt*—Conclusion.

THE question in the case of the *Steamship Balmoral Co.* v. *Marten* [1902], *A.C.*, 511, is important in its bearing on a rule of practice which has prevailed with underwriters and average staters in this country for a long period. The facts, as here stated, will be found concisely set out in Lord Macnaughten's judgment in the case. Ship, cargo and freight had to contribute to general average and salvage charges. For the purpose of contribution the values of the ship, cargo and freight at risk were ascertained. There was no question as to the value of the cargo or the freight. The value of the ship was taken to be £40,000, being the amount at which it was valued in the salvage proceedings. Contribution from the ship in respect of general average and salvage charges worked out at £530 8s. 8d. That amount was claimed by the underwriters. The underwriters said: "That may be the proper amount of contribution as between ship, cargo, and freight, but as between us and you the policy on the ship was a valued policy. It was stipulated that 'for so much

as concerns the assured by agreement between the assured and assurers,' the ship, with its machinery and everything connected therewith, was valued at £33,000. As the value in the policy is so much less than the contributory value, we are only bound to pay a proportionate amount, or thirty-three fortieths of the ship's contribution." To that the shipowners answered: "You are opening the policy. The ship was fairly valued at £33,000. That value as between you and us must hold good for all purposes. You have nothing to do with the value put upon the ship at a different time and for a different purpose. It is impossible to determine with any degree of accuracy the value of a thing which is not an article of commerce. The agreed value in the policy is, or was at the time of the agreement, just as truly the 'real value' as the value arrived at somehow or other in the salvage proceedings. The ship was fully insured, and you must make good the loss just as you would have had to reimburse the cost of repairs made necessary by sea damage."

Many authorities were cited and all the available text-books were referred to. *Phillips on Insurance*, section 1410, was cited, Lord Macnaughten being of opinion that he puts the case very fairly when he says (section 1410): "There is nothing in the policy that favours one of these modes of construction in preference to the other, each being consistent with the language of the instrument". His (Phillips') conclusion is that the question must depend on the application of "the general principles of insurance," but Lord Macnaughten did not think that one got rid of

the difficulty by referring it to the general principles of insurance. It seemed to him (Lord Macnaughten) that there was as much to be said on the one side as on the other. It was held that the underwriters were liable only for that proportion of the salvage and general average losses which the policy value bore to the proved value.

A charter party provided that the cargo was to be "discharged with customary despatch as fast as the steamer can . . . deliver during the ordinary working hours" of the port of discharge, "but according to the custom" of the port, "Sundays, general or local holidays (unless used) excepted". The question was—What was the meaning of this clause? It was decided that the proper construction to be put upon the words used (above set out) was that the discharge of the cargo was to be with the utmost despatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time not being circumstances brought about by the person whose duty it was to take delivery or circumstances within his control (*Hulthen* v. *Stewart & Co.* [1903], *A.C.*, 389).

In 1899 gold of the value of £211,000 belonging to the appellants (Robinson Gold Mining Co.) was sent by rail from Johannesburg to Cape Town *en route* for London, and was removed from the train in the territory of the South African Republic by a Government official who had received a telegram from the State-Attorney, Pretoria, ordering him to take the gold into safe custody. The Government of the Republic was

in this matter (as found by Phillimore, J.) acting according to the laws of the Republic, and exercising a constitutional right to commandeer the property of subjects of the Republic in view of the impending war, which broke out a few days after. The gold had been insured during its transit from the mines to Johannesburg and Cape Town, and thence by steamer to the United Kingdom, against (*inter alia*) "arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever". The policy contained this clause: "Warranted free of capture, seizure and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities or warlike operations, whether before or after declaration of war". The appellants having brought an action on the policy against the insurers, Phillimore, J., gave judgment for the respondents (Alliance Insurance Co.), and this decision was affirmed by the Court of Appeal (Collins, M.R., Mathew and Cozens-Hardy, L.JJ.).

In giving judgment in the House of Lords in this case, Lord Halsbury said (*inter alia*): "I confess I cannot entertain the least doubt in the world that the language here is used in its plain and natural sense, and if it is construed in its plain and natural sense I think the judgment of the Court of Appeal is absolutely right . . . the truth is the word 'seizure' is intended to be used in a general sense. This gold was seized, taken away, and ultimately used by the Government of the South African Republic. It was taken—I do not care whether they had authority according to their

law or not—as a matter of fact it was taken, and that was one of the things excluded from the losses insured against. The bargain between the parties put in plain terms is: 'I, the underwriter, will not be responsible if this gold is taken away and seized by any authority whatsoever'. That is the plain meaning of the bargain. . . . That is the bargain which the parties have agreed to . . . to my mind these words are absolutely plain. The words seem to me to take out of the perils insured against the particular thing that has happened. I decline to go into it farther than this—that this gold was seized. . . . I think the Transvaal Government intended to appropriate the gold from the first; but whether that was their intention or not they seized it, and took care that it should be within their power and control if they thought proper to use it. Under these circumstances it seems to me that the terms of the warranty clearly apply." Lords Macnaughten, James and Lindley concurred (*Robinson Gold Mining Co.* v. *Alliance Insurance Co.* [1904], *A.C.*, 359).

In the case of the *Boston Fruit Co.* v. *British and Foreign Insurance Co.* [1906], *Com. Cas.*, 196, the charterers of the S.S. *Barnstable*, who navigated her under a charter party amounting to a demise of the ship, were held liable in the United States to pay damages to the owners of another ship with which the *Barnstable* had come into collision. The question in that case, which was decided in the House of Lords in 1906, was, whether the charterers could recover against the defendant underwriters on a policy not effected by themselves, but effected by brokers in-

structed by the owners, which included risk of having to pay damages arising from collision, and contained a description of the assured wide enough to cover the plaintiffs or any others concerned in interest. The House of Lords, as also did the Court of Appeal, held that that question must be decided in the negative. The substantial contentions of the plaintiffs were as follows: They said that being within the description they were entitled to the benefit of the policy, because the owners were bound to insure, and so should be taken to have insured charterers' risk by virtue of clause 22 of the charter party. Clause 22 was as follows: "The owners shall pay for the insurance on the vessel". In the opinion of Lord Loreburn (L.C.) those words did not so bind the owners, and if an action were brought on such a clause, for breach of contract to insure it would fail. Next, the plaintiffs urged that they were entitled to the benefit of the policy because it was to be taken to mean what it said, namely, that all "to whom the subject-matter of this policy does, may, or shall appertain in part or in all" were insured. He agreed that a policy might be made for the benefit of all such persons. But where it had been established that in fact the person claiming the benefit was not such a person as those who effected the policy had in contemplation, courts had disallowed his claim though he might be within the description. In the case under consideration the plaintiffs and the owners agreed in the course of the American litigation that the former had no insurance on the *Barnstable*, and the litigation was for a long time conducted by the plaintiffs on the

footing that the owners intended to insure their own interest and no other. This in reality was the only evidence in regard to intention. The appeal was dismissed with costs.

Apparently, deviation deprives the shipowner of the stipulations in the bill of lading limiting his liability, though the damage did not occur during the deviation (*Thorley* v. *Orchis Steamship Co.* [1906], 23 *T.L.R.*, 89).

In the case of *C. A. Van Eijck and Zoon* v. *Somerville* [1906], *A.C.*, 489, which was an appeal against the decision of the Court of Session (Scotland) in a proceeding under sections 503 and 504 of the Merchant Shipping Act, 1894, the short question was whether the finding of value in collision proceedings between owners of two ships is conclusive on owners of cargo in ulterior proceedings. It was held that it was not.

The latest case reported before going to press which has reference to the subject of marine insurance is that of the *Hull Steamship Company* v. *Lamport and Holt* decided by Channell, J., on 15th April, 1907. In that case, which is set out in 23 *T.L.R.*, 445, the plaintiffs claimed to recover £124 7s. 9d. paid by them under protest in respect of the lighterage of certain goods. The plaintiffs were the owners and the defendants were the charterers of the steamship *Queenborough*. By the charter party the ship was to load a cargo including explosives and machinery as ordered, and being loaded, should proceed to Monte Video, Buenos Ayres (including Boca) and Rosario in the order named, and there in regular turn at the customary discharging places named by the charterers' agents into lighters or alongside custom-house and railway or

other wharves, as per bills of lading, delivered her cargo according to the custom of the ports of discharge. The owners authorised the charterers to sign bills of lading for the cargo as usual, and agreed to be bound by all the conditions thereof, and the cargo was to be brought to and taken from alongside at the charterers' risk and expense. By the bill of lading the cargo was to be discharged at the consignees' wharf at Boca, provided the same was available, otherwise lighters were to be provided by the consignees. At Boca a ship carrying explosives was only allowed to discharge at a certain wharf, and the ship therefore could not go to the consignees' wharf (which was available), and the consignees' goods had to be lightered there. In an action by the shipowner against the charterers to recover the expense of lightering, it was decided that the shipowner was entitled to recover.

To sum up: The contract of marine insurance is a contract of indemnity based on the utmost good faith. There must be no concealment of material facts. The general rule of law is, that the underwriter only insures against sea risks; if other risks are intended to be included, these must be inserted in the policy. The words used to specially except land in a marine policy are "*no interior risk*". The subjects of marine insurance include pecuniary benefits, property, and pecuniary liabilities exposed to sea risk, etc. The persons who can be assured are those who stand in any legal or equitable relation to the adventure. Every policy of marine insurance *not founded on an insurable interest is void*, and would be termed a gaming or wagering policy. The persons who have an insurable interest in the

ship are (1) the shipowners whether registered or not, equitable as well as legal; (2) the charterers. Generally speaking, however, the shipowners have alone an insurable interest in the *freight*, but charterers may insure *dead freight*. The insurable interest in goods rests in the person who has the right of property, and the person named as shipper or assignee in the bill of lading has an insurable interest, and *purchasers* have also an insurable interest in goods. The insurable interest in the subject-matter insured *must be in existence* at the time of the loss. There may be an insurable interest in a defeasible, contingent, or inchoate interest, so also may there be in a partial interest whether jointly or in common, and an insurer under a contract of marine insurance may have an insurable interest. The extent of insurable interest is determined by the *gross* and not the *net* interest. An assignment does not carry with it an assignment of the assured's right, unless there is an express or implied agreement to that effect. An agent of the assured may effect policies. The limit of assurance on the thing assured is determined by the insurable value. In open policies, where no sum is stated by the policy, its value is taken to be what it was *at the beginning of the risk*, and *not* as it would have been if no risk had been undertaken. Lastly, the risk under a marine insurance policy ends at the time agreed upon, and stated in it.

APPENDIX I.

THE COMMON FORM OF A MARINE INSURANCE POLICY.

Be it known that as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause and them and every of them, to be insured, lost or not lost, at and from

upon any kind of goods and merchandises and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel called the whereof is Master, under God, for this present voyage

or whosoever else shall go for Master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called beginning the adventure upon the said goods

and merchandises from the loading thereof aboard the said ship

upon the said ship, etc.

and shall so continue and endure, during her abode there upon the said ship, etc.; and further, until the said ship with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever shall be arrived at

upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, etc., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are, of the Seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other

perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, etc., or any part thereof; and in any case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured

at and after the rate of

In witness whereof, we the assurers have subscribed our names and sums assured in

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five

pounds per cent.; and all other goods, also the ship and freight are warranted free from average under three pounds per cent., unless general, or the ship be stranded. [But see the form prescribed under the Marine Insurance Act, 1906, in Appendix II.]

APPENDIX II.

[6 EDW. 7.] *Marine Insurance Act*, 1906. [CH. 41.]

AN ACT TO CODIFY THE LAW RELATING TO MARINE INSURANCE. [21ST DECEMBER, 1906.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

MARINE INSURANCE.

Marine insurance defined.

1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

Mixed sea and land risks.

2.—(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine

policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

Marine adventure and maritime perils defined.

3.—(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(*a*) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(*b*) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;[1]

(*c*) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.[2]

[1] See pp. 95, 96.

[2] See pp. 3, 4, 5.

INSURABLE INTEREST.

Avoidance of wagering or gaming contracts.

4.—(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(*a*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(*b*) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

Insurable interest defined.

5.—(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

When interest must attach.

6.—(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:

Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

7.—(1) A defeasible interest is insurable, as also is a contingent interest.

Defeasible or contingent interest.

(2) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

Partial interest.

8. A partial interest of any nature is insurable.

Reinsurance.

9.—(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may reinsure in respect of it.

(2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such reinsurance.

Bottomry.

10. The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.

Master's and seamen's wages.

11. The master or any member of the crew of a ship has an insurable interest in respect of his wages.[1]

Advance freight.

12. In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

[1] See p. 27.

Charges of insurance.

13. The assured has an insurable interest in the charges of any insurance which he may effect.

Quantum of interest.

14.—(1) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

(2) A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

Assignment of interest.

15. Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law.[1]

INSURABLE VALUE.

Measure of insurable value.

16. Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:—

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and

[1] See pp. 2, 16.

stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole:

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

Disclosure and Representations.

17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party. Insurance is uberrimae fidei.

18.—(1) Subject to the provisions of this section, Disclosure by assured.

the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely :—

(*a*) Any circumstance which diminishes the risk;

(*b*) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(*c*) Any circumstance as to which information is waived by the insurer;

(*d*) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

Disclosure by agent effecting insurance.

19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed,

where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(*a*) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(*b*) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

Representations pending negotiation of contract.

20.—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.[1]

When contract is deemed to be concluded.

21. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

THE POLICY.

Contract must be embodied in policy.

22. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

What policy must specify.

23. A marine policy must specify—

(1) The name of the assured, or of some person who effects the insurance on his behalf:

(2) The subject-matter insured and the risk insured against:

(3) The voyage, or period of time, or both, as the case may be, covered by the insurance:

(4) The sum or sums insured:

(5) The name or names of the insurers.

Signature of insurer.

24.—(1) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.

[1] See pp. 33-49.

(2) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.

Voyage and time policies.

25.—(1) Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy". A contract for both voyage and time may be included in the same policy.

1 Edw. 7, c. 7.

(2) Subject to the provisions of section eleven of the Finance Act, 1901, a time policy which is made for any time exceeding twelve months is invalid.

Designation of subject-matter.

26.—(1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

Valued policy.

27.—(1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the

insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

Unvalued policy.

28. An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore specified.

Floating policy by ship or ships.

29.—(1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of despatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

30.—(1) A policy may be in the form in the First Schedule to this Act. Construction of terms in policy.

(2) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

31.—(1) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable. Premium to be arranged.

(2) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens, but no arrangement is made, then a reasonable additional premium is payable.[1]

Double Insurance.

32.—(1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be overinsured by double insurance. Double insurance.

(2) Where the assured is overinsured by double insurance—

(*a*) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(*b*) Where the policy under which the assured claims is a valued policy, the assured must

[1] See pp. 2, 14, 15, 27, 29, 33, 94.

give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

(*c*) Where the policy under which the assured claims is an unvalued policy, he must give credit, as against the full insurable value, for any sum received by him under any other policy;

(*d*) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

WARRANTIES, ETC.

Nature of warranty.

33.—(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

34.—(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law. When breach of warranty excused.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

35.—(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred. Express warranties.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

36.—(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk. Warranty of neutrality.

(2) Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

No implied warranty of nationality.

37. There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

Warranty of good safety.

38. Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

Warranty of seaworthiness of ship.

39.—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

40.—(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy. No implied warranty that goods are seaworthy.

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner. Warranty of legality.

THE VOYAGE.

42.—(1) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.[1] Implied condition as to commencement of risk.

(2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

43. Where the place of departure is specified by the policy, and the ship instead of sailing from that Alteration of port of departure.

[1] See pp. 90, 91, 93.

place sails from any other place, the risk does not attach.

Sailing for different destination.

44. Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

Change of voyage.

45.—(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.[1]

Deviation.

46.—(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy—

(*a*) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(*b*) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there

[1] See pp. 2, 27.

must be a deviation in fact to discharge the insurer from his liability under the contract.[1]

47.—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation. Several ports of discharge.

(2) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.[2]

48. In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.[3] Delay in voyage.

49.—(1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused— Excuses for deviation or delay.

(*a*) Where authorised by any special term in the policy; or

(*b*) Where caused by circumstances beyond the control of the master and his employer; or

(*c*) Where reasonably necessary in order to comply with an express or implied warranty; or

(*d*) Where reasonably necessary for the safety of the ship or subject-matter insured; or

[1] See pp. 50, 51. [2] See pp. 50, 51. [3] See pp. 50, 51.

(*e*) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(*f*) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(*g*) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch.[1]

ASSIGNMENT OF POLICY.

When and how policy is assignable.

50.—(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by endorsement thereon or in other customary manner.

Assured who has no interest cannot assign.

51. Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly

[1] See pp. 50, 51.

agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss.[1]

THE PREMIUM.

When premium payable.

52. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

Policy effected through broker.

53.—(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.

Effect of receipt on policy.

54. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of

[1] See p. 90.

fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.[1]

Loss and Abandonment.

Included and excluded losses.

55.—(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular,—

(*a*) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(*b*) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(*c*) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to

[1] See p. 2.

machinery not proximately caused by maritime perils.

Partial and total loss.

56.—(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.

Actual total loss.

57.—(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.

Missing ship.

58. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

Effect of transhipment, etc.

59. Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the

master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.

Constructive total loss defined.

60.—(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular there is a constructive total loss—

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (*a*) it is unlikely that he can recover the ship or goods, as the case may be, or (*b*) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

Effect of constructive total loss.

61. Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer, and treat the loss as if it were an actual total loss.

Notice of abandonment.

62.—(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) Where notice of abandonment is accepted, the abandonment is irrevocable. The acceptance of the

notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has reinsured his risk, no notice of abandonment need be given by him.

Effect of abandonment.

63.—(1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

PARTIAL LOSSES (INCLUDING SALVAGE AND GENERAL AVERAGE AND PARTICULAR CHARGES).

Particular average loss.

64.—(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges,

are called particular charges. Particular charges are not included in particular average.

Salvage charges.

65.—(1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

General average loss.

66.—(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average ex-

penditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against.

(7) Where ship, freight and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

Measure of Indemnity.

Extent of liability of insurer for loss.

67.—(1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity.

(2) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears

to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

Total loss.

68. Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured—

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

Partial loss of ship.

69. Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty:

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above:

3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not

exceeding the reasonable cost of repairing such damage, computed as above.

Partial loss of freight.

70. Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

Partial loss of goods, merchandise, etc.

71. Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy:

(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss:

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between

the gross sound and damaged values at the place of arrival bears to the gross sound value:

(4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers.

Apportionment of valuation.

72.—(1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act.

(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.

General average contributions and salvage charges.

73.—(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the

subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

(2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.

Liabilities to third parties.

74. Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

General provisions as to measure of indemnity.

75.—(1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case.

(2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

Particular average warranties.

76.—(1) Where the subject-matter insured is warranted free from particular average, the assured cannot

recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

(2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

Successive losses.

77.—(1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:

Provided that nothing in this section shall affect the

liability of the insurer under the suing and labouring clause.

Suing and labouring clause.

78.—(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

Rights of Insurer on Payment.

Right of subrogation.

79.—(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the

insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

Right of contribution.

80.—(1) Where the assured is overinsured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

Effect of under insurance.

81. Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

Return of Premium.

Enforcement of return.

82. Where the premium, or a proportionate part thereof is, by this Act, declared to be returnable,—

(*a*) If already paid, it may be recovered by the assured from the insurer; and

(*b*) If unpaid, it may be retained by the assured or his agent.

Return by agreement.

83. Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof,

on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.

Return for failure of consideration.

84.—(1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3) In particular—

(*a*) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable:

(*b*) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable:

Provided that where the subject-matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival;

(*c*) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering;

(*d*) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;

(*e*) Where the assured has overinsured under an unvalued policy, a proportionate part of the premium is returnable;

(*f*) Subject to the foregoing provisions, where the assured has overinsured by double insurance, a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.

MUTUAL INSURANCE.

Modification of Act in case of mutual insurance.

85.—(1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.

(2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or

such other arrangement as may be agreed upon, may be substituted for the premium.

(3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

SUPPLEMENTAL.

Ratification by assured.

86. Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.

Implied obligations varied by agreement or usage.

87.—(1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.

(2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

Reasonable time, etc., a question of fact.

88. Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact.

Slip as evidence.

89. Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.

90. In this Act, unless the context or subject-matter otherwise requires,— Interpretation of terms.

"Action" includes counter-claim and set off:

"Freight" includes the profit derivable by a ship-owner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money:

"Moveables" means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents:

"Policy" means a marine policy.

91.—(1) Nothing in this Act, or in any repeal effected thereby, shall affect— Savings.

(*a*) The provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue; 54 & 55 Vict. c. 39.

(*b*) The provisions of the Companies Act, 1862, or any enactment amending or substituted for the same; 25 & 26 Vict., c. 89.

(*c*) The provisions of any statute not expressly repealed by this Act.

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

92. The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in that schedule. Repeals.

93. This Act shall come into operation on the first day of January one thousand nine hundred and seven. Commencement.

94. This Act may be cited as the Marine Insurance Act, 1906. Short title.

SCHEDULES.

Section 30.

FIRST SCHEDULE.

FORM OF POLICY.

Lloyd's S.G. policy.

BE IT KNOWN THAT as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause and them, and every of them, to be insured lost or not lost, at and from

Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the whereof is master under God, for this present voyage,

or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,

upon the said ship, etc.

and so shall continue and endure, during her abode there, upon the said ship, etc. And further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and

merchandises whatsoever shall be arrived at

upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguards and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or

[Sue and labour clause.]

[Waiver clause.]

preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in London.

[Memorandum.] *N.B.*—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded.

RULES FOR CONSTRUCTION OF POLICY.

The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require :—

Lost or not lost. 1. Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches unless at such time the assured was aware of the loss, and the insurer was not.

From. 2. Where the subject-matter is insured "from" a

particular place, the risk does not attach until the ship starts on the voyage insured.

3.—(*a*) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately. [At and from. [Ship.]]

(*b*) If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

(*c*) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety. [Freight.]

(*d*) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

4. Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship. [From the loading thereof.]

5. Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases. [Safely landed.]

Touch and stay.

6. In the absence of any further licence or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.

Perils of the seas.

7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

Pirates.

8. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.

Thieves.

9. The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.

Restraint of princes.

10. The term "arrests, etc., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.

Barratry.

11. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.

All other perils.

12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

Average unless general.

13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges".

Stranded.

14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.

Ship.

15. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and,

in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.

16. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money. Freight.

17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board. Goods.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

SECOND SCHEDULE.

Section 92.

Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 Geo. 2, c. 37.	An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandises or effects laden thereon.	The whole Act.
28 Geo. 3, c. 56.	An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled "An Act for regulating Insurances on Ships, and on goods, merchandises or effects," and for substituting other provisions for the like purpose in lieu thereof.	The whole Act so far as it relates to marine insurance.
31 & 32 Vict., c. 86.	The Policies of Marine Assurance Act, 1868.	The whole Act.

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